Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

October Term, 1997

RANDY SAYLOR, SR., suing individually and DEBBIE SAYLOR, suing individually and as Next Friend of RANDY SAYLOR, JR., an infant,

Petitioners,

vs.

SAM B. SAYLOR, JIM ROARK, and WILLIAM A. LEE,

Respondents,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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46 pp

QUESTION PRESENTED

Are a state public school teacher and other school officials entitled to claim and receive qualified immunity or exoneration for their acts and conduct under federal civil rights law, if such individuals admit that they knowingly violated the published policy and regulations of the school system by acting or causing the corporal punishment of a pupil in violation of such policy, and if such individuals admit that excessive force was used for such punishment with resulting injury to such pupil?

PARTIES TO THE PROCEEDING

A list of all parties to this proceeding is contained in the caption to this case.

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Appendix C - Opinion and Order of the United States District Court for the Eastern District of Kentucky dated December 29, 1994 ..... C-1

The Petitioners, Randy Saylor, Jr., Randy Saylor and Debbie Saylor respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit will be reported in 118 F.3d 507 (1997), and is reproduced hereto as Appendix A. The opinion of the United States District Court of the Eastern District of Kentucky is not reported but is reproduced hereto as Appendix C.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on the date of July 22, 1997 pursuant to letter from the Clerk of such Court dated as of July 22, 1997 and reproduced hereto as Appendix B.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall ...be deprived of life, liberty, or property without due process of law. . ."

The Fourteenth Amendment to the United States Constitution provides in relevant part: ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law. . ."

42 U.S.C. Sec. 1983 provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State. . . subject or causes to be subjected, any citizen of the United States ...to the deprivation of any rights, privileges, or immunities secured by

the Constitution and laws, shall be liable to the party injuredin an action at law, suit in equity, or other proper proceeding for redress. . ."

STATEMENT OF THE CASE

The Petitioners are Randy Saylor, Jr., and his parents, who filed this suit when he was a juvenile. He is now an adult, but will be referred to herein as "Randy". This case deals with the situation which occurred initially on the date of December 12, 1990, when Randy was a student in the Eighth grade at the Wallins Elementary School. This school was a part of the system of the Harlan County Board of Education. The Respondents are respectively, the principal, vice principal, and the mathematics teacher of the school.

The written opinion and decision of the Sixth Circuit Court of Appeals is appended hereto as Appendix A. This opinion is comprehensive and contains a full discussion of the facts and issues presented in this litiation. It submitted, however, that the following factors should be noted for a full comprehension of the position of the Petitioners in this matter.

There existed a Code of Conduct, or regulations, adopted by the Harlan County Board of Education as of the date of this incident. This Code of Conduct regulated the operations of the school system as to pupils and the staff of each school. This Code of Conduct provided for two forms of punishment if an offense was committed by a pupil in the school. These forms of punishment were either suspension or corporal punishment. The regulations provided that corporal punishment could not be used if the parents did not consent to such and informed the administration of such desire. Suspension was used in lieu of corporal punishment. In this situation, the pupil was dismissed from the school and could not return until the parents met with the school officials and resolved the disciplinary problem. After such, the pupil could

return to the school.

The facts herein are that Randy did engage in a fight in the mathematics classroom on the subject date when the teacher was not in the room. This fight was with another boy due to a prior dispute. The vice-principal came by the classroom and stopped such. He took both boys to his office, and discussed corporal punishment with the youths.

Randy was not paddled initially as he had protested this form of punishment due to the desires of his parents. His parents had withdrawn the consent for corporal punishment due to an incident the prior year. Randy was then suspended formally by the vice principal and was advised to call his mother from the office so that she could come and remove him from the school. Randy could not reach his mother on the phone at first and remained in the office to make the call to his mother.

The mathematics teacher had been in the office and had discussed the paddling situation with Randy. He was aware of the factor that Randy had explained he could not be paddled and that he was suspended by the vice principal. The teacher had left to give a test to the class, and had later returned to the office. He saw Randy there, and attempted to secure his consent to be paddled. Randy contends that he was advised that he could not take the test due to the suspension and that he may fail the Eighth grade. The teacher then left the office. After the class, the teacher returned to the office and again discussed the situation with Randy. At this point, Randy consented to be paddled.

The principal of the school became involved in this matter prior to the third meeting with the teacher and Randy. He had seen Randy in the office and discussed the situation with him, and was advised that Randy did not wish to be paddled due to circumstances. The principal acknowledged in the case that he was aware that Randy's parents had withdrawn consent for corporal punishment due to a prior

incident. He further advised that he believed the pupil could not retract the restrictions of the parents in such matters. The principal later permitted the paddling of Randy, however, when he was asked by the teacher to witness such after Randy consented to the paddling.

Prior to the paddling, the teacher advised Randy and the principal that he was going to bust Randy's butt. The principal admonished the teacher to administer discipline, and offered to do the paddling. The teacher rejected the offer, and gave Randy three blows. At this point, Randy was crying and in obvious distress. The phone rang and the principal answered such and returned. He advised that the paddling was over, but the teacher stated that he had two more blows, and did so. The teacher then left the office and the principal comforted Randy and took him to the restroom to compose himself. Randy later went to take the mathematics test with the teacher, but he could not take it due to his emotional state. He attended the other classes at school and went home on the bus at the end of the school day.

The aftermath of this incident involves the consensus that the teacher used excessive force in administering the punishment. Randy was examined later by a physician. He was not severely injured due to the paddling. His buttocks were substantially bruised and he suffered emotional distress from the incident. In particular, Randy became afraid of the teacher and did not desire to attend his classes any further. He did not return to school immediately after the paddling and after the Christmas vacation. After he did return, Randy first stayed in the office during the mathematics class. His parents later protested this situation in a meeting with the school board in mid-January, 1991. After such, Randy was placed into a remedial mathematics class. He received individual instruction from the teacher in this class for the reminder of the school year. He did graduate from the Eighth grade.

The parents of Randy became involved in this matter after he came home from school, and as they became aware of his condition. His parents first met with the principal of the school the next day. They desired that the teacher be reprimanded and punished in some manner for his acts. This meeting did not resolve their concerns. No action was taken with regard to the teacher. The parents later met with the school board in January, 1991 to correct the factor that Randy was not receiving mathematics instruction, and to have the teacher punished in some manner. This meeting did not result in a solution which was satisfactory to the parents. No action was taken as to the teacher by the board. The teacher is the son of a retired superintendent of the school system. The parents believed that this was a factor in this matter, and concluded that the school board would take no action to satisfy their desires in this matter.

The parents later met with the county officials over the corporal punishment of their son. The parents went to the grand jury and secured an indictment of the teacher over the incident. The father of the teacher then went to Randy's father and requested that he dismiss the indictment. Randy's father was advised that if he did not do so, the school officials would secure negative conduct reports from the teachers of Randy at the school, and place such into his school file. Randy's father refused to dismiss the indictment of the teacher. The vice principal of the school later went to Randy's teachers and secured negative conduct reports and placed such into his file. At a later point, the teacher and the principal went before the grand jury. The grand jury then dismissed the indictment of the teacher. This litigation is the result of these events.

All parties have acknowledged that the force used to perform the corporal punishment as to Randy was excessive. It appears undisputed that Randy did suffer some injury due to this punishment, but the injury was not severe.

The paddling occurred in the presence of the principal of the school. He did not stop such when Randy was in obvious distress after the third blow of the paddle. Moreover, the principal permitted the paddling initially, even though he was aware that the parents did not wish that their son be paddled under the school regulations. No explanation has been provided by any Respondent in this case as to why Randy's rights under the regulations were not observed in this matter. The only reason, which is disputed, is that the teacher contends that Randy's father at some point gave him permission to use corporal punishment in the event Randy misbehaved in his classroom.

This case is otherwise unique in that the paddling occurred after Randy had been disciplined by his suspension from the school. His only reason for being at the school was that his mother could not be reached to remove him from the school. At the initial meeting with the vice principal and the teacher, Randy had been punished under the regulations by a suspension from the school. However, the teacher met with him on two subsequent occasions to secure his consent to be paddled, until Randy did relent and agree to the corporal punishment. As to the principal, he had previously met with Randy and was aware of the situation and that Randy had rejected the paddling. The principal further knew that the parents did not wish Randy to be paddled and that he had been suspended under the school system's Code of Conduct. In the light of these factors, no explanation has been provided by the Respondents as to what legitimate school purpose had been served by the treatment of Randy under the circumstances presented in this case.

EXISTENCE OF JURISDICTION BELOW

This litigation was commenced by a Complaint filed in the United States District Court for the Eastern District of

Kentucky on the date of December 12, 1991. The basis for the Complaint and claims of the Petitioners were the First and Eighth Amendments to the United States Constitution and 42 U.S.C. Sec. 1983. The United States District Court later ruled that the First and Eighth Amendments were not applicable to this case, but did rule that under the pleadings filed herein, the Fifth and Fourteenth Amendments to be enforced under 42 U.S.C. Sec. 1983 were the proper basis for this action. The United States District Court denied the Motion for Summary Judgment for qualified immunity by the Respondents by its opinion and Order dated as of December 29, 1994. This Court did grant the Respondents an interlocutory appeal under 28 U.S.C. Sec. 1291 by its Order dated as of January 18, 1995.

REASONS FOR GRANTING THE WRIT

The Petitioners submit that this Court should examine this case as it involves material questions concerning the rights of school children which exist as matters of federal law. A review of the case decisions on this subject appear to provide differing postures on this topic. In this case, the Sixth Circuit Court of Appeals made a full analysis of this matter and determined that a dismissal of the claims of the Petioners was justified under the facts and law in this interlocutory appeal. In particular, the Court determined that the principal and vice pincipal did not commit any legal violation in this matter as to Randy. In contrast, the Court did review the role of the teacher in this case, and questioned his conduct in this matter. The decision, however, provides that this Respondent is entitled to qualified immunity for his acts as the federal case law at the time did not alert him to the factor that the use of excessive force would violate the rights of the Petitioner in this matter. With due respect to the Court of Appeals, the Petitioners disagree with both conclusions for the reasons herein stated, and urge that

this Court review this decision.

The Petitioners contend that this case involves two violations of the liberty interest of this pupil by the Respondents. The force used by the teacher to conduct the paddling was admittedly excessive and caused injury to Randy. This event was witnessed by the principal who permitted such to occur and continue even though he was aware that Randy was in distress. The Petitioners otherwise note that this treatment of Randy was arbitrary and improper as it was done in violation of the Code of Conduct which had been adopted by the school board of the school system. The corporal punishment was additionally improper as Randy had been suspended from the school under the regulations. As such, the physical punishment was unnecessary and arbitrary and served no educational purpose at the time. As a final matter, the context of the decision of the Court of Appeals infers that a youth has the capacity to waive his rights under school policy guidelines with regard to the forms of punishment provided for misbehavior in the regulations, and if so, the adult actors are entitled to qualified immunity for their conduct. The Petitioners urge that these Respondents did violate the established rights of Randy by their acts and conduct in this incident, and that they are not entitled to qualified immunity under the circumstances presented in this matter.

This Court decided the case of *Ingraham v. Wright, 430 U.S. 651 (1977)* and provided the basic federal law on this subject. In this case, this Court analyzed the subject of corporal punishment in public schools and determined that such was not unlawful per se as a means of maintaining discipline as it was not a cruel and unusual punishment or a violation of the due process rights of pupils. This ruling is, in effect, that corporal punishment is not a cognizable federal law violation if the actions taken by the school officials are reasonable and done for the legitimate purposes of school

administration. This decision does not provide school officials with an unrestricted right to violate the personal security of pupils in schools. Corporal punishment which is done in an unreasonable manner, or for improper motives will be regarded as a substantive due process violation of the pupil under the Fourteenth Amendment.

Petitioners contend herein that the corporal punishment of Randy was unreasonable as it was done with excessive force. This factor has been admitted by the Respondents in the context of this case. The federal case law at the time provided that the use of such force was an unreasonable intrusion of personal security of a pupil under the *Ingraham* case decision. See: *P.B. v. Koch, 96 F. 3d 1298 (9th C.1996); Wood v. Ostrander, 879 F.2d 583 (9th C.1989), cert. den. 498 U.S. 938 (1990); Wise v. Pea Ridge School District, 855 F.2d 560 8th C.1988); Metzger v. Osbeck, 841 F.2d 518 (3rd C.1988); Webb v. McCullough, 828 F.2d 1151 (6th C.1987); Garcia v. Miera, 817 F.2d 650 (10th C.1987), cert. den. 485 U.S.959 (1988); Hall v. Tawney, 621 F.2d 607 (4th C.1980).* In the instant case, the teacher announced his intention to 'bust his butt' and did so in the paddling. The principal observed this situation and did not intervene or stop this treatment. As both Respondentsadmitted that the force used in this incident was excessive, it is submitted that neither of them are entitled to qualified immunity for their conduct in this matter.

The actions of the Respondents herein were arbitrary and unreasonable as there was no need to inflict corporal punishment on Randy as this form of punishment had been selected under the school system's Code of Conduct. Each Respondent admitted that they were aware of the provisions of the code. With the exception of the teacher, it was admitted that the others knew that Randy's parents had rejected corporal punishment for him. The teacher did not express his position in this matter until this litigation began.

In any event, Randy had expressed this position to each Respondent while he was in the school office. He was accordingly suspended initially due to his protests under the provisions of the Code of Conduct. By its terms, this code was adopted, in part, to protect the constitutional and legal rights of the pupils in the school system.

In its decision on this matter, the District Court found that the Code of Conduct of this school system did exist for all purposes at the time of this incident. It further determined that the Respondents knowingly violated the such code by ignoring its restrictions and paddling Randy under the circumstances. As the violations did occur, and as the Petitioner was injured as a result of such, the Fifth and Fourteenth Amendment liberty interest for personal security was violated under the existent law. See: *Franklin v. Auycock, 795 F.2d 1253 (6th C. 1986); Spruyette v. Walters, 753 F.2d 498 (6th C. 1985), cert. den. 477 U.S. 1054 (1986); Kendall v. Board of Ed. of Memphis City, 627 F.2d 1 (6th C.1980).* Under all of the above factors, the Petitioners contend that the Respondents were not entitled to qualified immunity. As this code did exist for some purpose related to the administration of the school system, it is suggested that the provision of this code should be regarded as more than a matter of semantics. The concept of qualified immunity should not be expanded in matters of this nature to exonerate school officials and to permit them to act as they wish. If the pupils and their parents are expected to comply with these regulations, then it appears proper to expect the same from the school officials.

The Petitioners otherwise note that under the Code of Conduct, there was no need to use force in this situation due to the suspension of Randy which was provided in the first meeting with the vice principal and the teacher. This suspension was a disciplinary measure which was provided by the vice principal in the school for the misconduct of

Randy. This form of punishment is provided for in the code, and under such, Randy could not attend classes and was required to leave the school. He was advised to contact his mother by phone and to have her remove him from the school. He was present in the office during this period as he could not reach his mother on the telephone for this purpose. In effect, there was no need to paddle Randy for his conduct as he had been punished by the suspension and the school officials were aware of this factor.

The corporal punishment of Randy, under the above circumstances, was arbitrary and did not serve any disciplinary purpose due to the factor of his suspension. No Respondent has yet explained in the course of this litigation the reason for the corporal punishment in the light of the prior suspension of the Petitioner. The purpose of school discipline had been maintained due to the suspension. In this regard, there was no need for the corporal punishment as a means of enforcing discipline in the school. Under the aforestated authorities, the Petitioners contend that the liberty interest of Randy was violated by the Respondents without any proper reason or motive. The Respondents likewise cannot claim qualified immunity for their conduct under the facts and legal authorities, and they should not have been exonerated for such conduct in this situation.

The final factor of concern relates to the content of the decision of the Court of Appeals and its footnote on the matter concerning the choice that Randy made for the paddling in lieu of the suspension. Randy would not have been present in the office for the subsequent discussions with the teacher to accept the paddling if he could have reached his mother to come and get him from the school after suspension. The situation presented is the factor that he was contacted on more than one occasion to accept the paddling while he remained in the office for the above purpose. As he was technically removed from the school at the time

due to the suspension, there would be no need for any adult educator to discuss this matter with him for any reason. Nevertheless, the teacher met with Randy until he consented to accept the corporal punishment.

This consent had some influence upon the Court of Appeals in its decision. This ruling deals with the premise that Randy made a choice in this matter to accept the corporal punishment in lieu of the suspension. The inference is made that this decision is a waiver of the youth to challenge the conduct of the adults in this situation, and may be a basis for qualified immunity under federal standards. It is submitted that this premise is incorrect if the adult conduct herein can be equated with the choice of a youth for such purposes. If this case can stand as authority for such a posture, this Court should examine such carefully under the concept of qualified immunity.

CONCLUSION

This case is not a challenge to corporal punishment as a means of discipline in public schools. It is contended, however, that qualified immunity should not be used as a means of exoneration of public school officials who have admitted that they acted improperly in a situation. For the reasons herein stated, the Petitioners request that this Petition be granted by this Court.

Respectfully, Submitted,

William D. Stark, Jr.
D. Randall Jewell
By: Counsel of Record

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1997 FED App. 0220P (6th Cir.)
File Name: 97a0220p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RANDY SAYLOR, SR., suing individually, and DEBBIE SAYLOR, suing individually and as next friend of RANDY SAYLOR, JR., an infant,
Plaintiffs-Appellees,

v.

BOARD OF EDUCATION OF HARLAN COUNTY, KENTUCKY,
Defendant,

SAM B. SAYLOR, JIM ROARK, and WILLIAM A. LEE,
Defendants-Appellants.

No. 95-5319

Appeal from the United States District Court
for the Eastern District of Kentucky at London.
No. 91-00280--William O. Bertelsman, Chief District Judge.

Argued: January 22, 1996

Decided and Filed: July 22, 1997

Before: CONTIE, NELSON, and BATCHELDER, Circuit Judges.

COUNSEL

ARGUED: Durenda L. Lawson, MILLWARD & JEWELL, Barbourville, Kentucky, for Appellee. Winter R. Huff, LAW OFFICES OF JOHN G. PRATHER, Somerset, Kentucky, for Appellant. **ON BRIEF:** William D. Stark, Jr., Barbourville, Kentucky, for Appellee. Winter R. Huff, LAW OFFICES OF JOHN G. PRATHER, Somerset, Kentucky, for Appellant.

OPINION

DAVID A. NELSON, Circuit Judge. A fourteen-year-old schoolboy, Randy Saylor, Jr., got into a wild fight with a classmate in a public school in Harlan County, Kentucky. Their teacher, Sam Saylor, punished each of them by administering five licks with a paddle. The paddling left the boys with bruised buttocks.

Young Saylor and his parents brought a federal civil rights action alleging, among other things, a violation of substantive due process rights guaranteed by the United States Constitution. The defendants (who include the teacher and the school's principal and assistant principal) ultimately asserted qualified immunity and other defenses in a motion for summary judgment. The district court denied the request for qualified immunity, and this interlocutory appeal followed.

Upon *de novo* review of the record, and treating all genuine issues of fact as having been resolved in favor of the plaintiffs, we conclude that judgment ought to have been entered in favor of the individual defendants on the

basis of qualified immunity. The denial of such immunity will be reversed.

I

Randy Saylor, Jr., was born at Harlan Appalachian Hospital on September 11, 1976. He attended Wallins Elementary School, in Harlan County, from kindergarten through the eighth grade. A younger sister followed him in school.

Resort to corporal punishment was not unknown at Wallins, and a number of the teachers kept paddles in their rooms. Prior to the incident out of which this lawsuit arose, according to the boy's deposition testimony, Randy had been spanked by five different teachers (but never by defendant Saylor) beginning as early as the fourth grade.

When Randy was in the seventh grade, a teacher named Henry Howard paddled him on the back of the legs hard enough to leave bruises. Upset at this, Randy's parents told the principal, defendant William Lee, that henceforth they did not want the school to administer corporal punishment to either of their children. (A "Code of Conduct" for the Harlan County schools provided that parents who objected to corporal punishment could so notify the proper school official upon enrollment of the student.) Mr. Lee subsequently testified at his deposition that he told all the teachers they were not to spank Randy Saylor.

When Randy entered the eighth grade in the fall of 1990, his mother testified, defendant Jim Roark, the assistant principal, was told that the Saylors didn't want their kids whipped in school. Randy's father, similarly, testified that he told both Roark and Lee at the beginning of the school year that he did not want corporal punishment used on his kids at Wallins. Neither Mr. Saylor nor Mrs. Saylor had occasion to convey this message directly to defendant Sam

Saylor,[1] Randy's eighth grade mathematics and history teacher. Sam Saylor had been told by Mr. Lee during the prior school year, however, that Randy's parents did not want him spanked at school.

A few weeks after Randy started the eighth grade, as the testimony of several witnesses established, Sam Saylor telephoned one of Randy's parents to report a problem with the boy's classroom behavior. Randy and his father met with Sam Saylor at the school the following day. In the course of the meeting, Sam Saylor testified, Randy's father told the teacher, *in haec verba*, "that if he [young Randy] gives you any more problem . . . I'm telling you to bust his ass." The father added, Sam Saylor said, that "if that don't do any good . . . you call me and [looking at the boy] I'll take you in front of that class and take my damned belt off and wear your ass out in front of that class." This conversation was reported to Assistant Principal Roark the next day, according to Sam Saylor, and Principal Lee testified that Sam Saylor likewise told him in October that Randy's father had given Sam permission to spank the boy.

Randy Saylor, Sr., testified that when his son misbehaved at home, he (the father) would whip him with a belt or a switch. In response to a general question by counsel for the defendants, however, Mr. Saylor denied ever having told Sam Saylor that it was all right for the latter to administer corporal punishment. The father subsequently volunteered that

> "I have told them people, all of them, if you have any problems with my kids whatsoever in this school, you are to contact me or their mother. If I'm not here that

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[1] Saylor is a common name in Harlan County. Sam Saylor and Randy Saylor, Sr., had known one another all their lives, but they were not aware of any blood relationship. Contrary to speculation offered by the district court at oral argument on the summary judgment motion, there had been no animosity between the two men prior to the paddling. "I thought Sam was a pretty good fellow," Randy Saylor, Sr., testified.

day, I'll miss work the next day to be here. If they need whipped, I'll whip them in front of you."

Young Randy testified that he remembered his father telling Sam Saylor, "Well, if he gives you any more problems, call me and I'll take care of him." The boy was not directly asked if he remembered his father telling the teacher to "bust his ass" if young Randy gave the teacher any more problems — nor was this question posed by counsel for either side during the father's deposition.

On December 12, 1990, as young Randy later told it, Randy was challenged to fight by a classmate, Brian Turner. Randy was big for his age [2] — much bigger than Brian — but this seems to have been no deterrent as far as Brian was concerned.

The trouble started in Mr. Howard's science class, according to Randy's testimony, when Randy felt something on his shoulder. He thought it was a paper wad thrown by Brian Turner, who was sitting a few seats behind him. Randy threw a paper wad at Brian, whereupon the latter, "cussing and carrying on," said he wanted to fight. Randy asked him to name the time, and Brian proposed the next break. (As both boys presumably knew, the Code of Conduct expressly prohibited fighting on school property. In this connection the Code said that "any student who finds himself/herself the victim of harassment should notify a teacher or principal.")

When the bell rang at the end of the period, the boys went on to Mr. Saylor's room for their mathematics class. The class was scheduled to begin at 12:45 p.m., but Mr. Saylor was late in getting back from a sixth grade class he had volunteered to teach several days a week during his

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[2] At a deposition conducted in February of 1993, when Randy was 16 years old, Randy testified that he weighed 240 pounds and stood 6'3" in height. At the time of the fight, he estimated, he had been about 5'10" tall and had weighed 180 pounds.

lunch hour. The sixth grade class was on another floor of the building.[3]

When Randy arrived at Mr. Saylor's room, according to Randy's testimony, Brian proposed getting the fight over with then and there. Randy, unfortunately, agreed. Brian swung first, hitting Randy in the face with his fist hard enough to leave a bruise. The boys fought for a time standing up, and Randy then wrestled Brian to the floor. Suggesting that they needed to stop fighting before Mr. Saylor arrived, Randy let Brian up. The latter came at him again, however, so Randy hit him with a plastic garbage can, scattering garbage everywhere. Then Randy hit Brian in the face with a small plastic water bucket, after which Randy started throwing yardsticks. Brian still wanted to fight, so Randy — "getting mad," in his words — picked up a folding metal chair with which he intended to hit the smaller boy. Other students got the chair away, whereupon Randy picked up a second chair. He testified that he was going at Brian with the chair when the assistant principal, Mr. Roark, came to the door and screamed at the combatants to get to his office. Randy threw the chair down and left the classroom.

When the boys got to the office, Randy testified, Mr. Roark told them that Mr. Saylor was going to be very angry and would expect them to be paddled; that fighting was against the rules; and that the boys had to apologize to one another. Sam Saylor arrived at the office at about this point and was filled in on the fight.

Mr. Saylor may or may not have been angry — Randy testified that "he was kind of angry acting" — but the prediction as to paddling proved accurate. Mr. Saylor told the boys that each of them would get five licks (the

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[3] The plaintiffs' attorneys have suggested that Mr. Saylor might have been late because he was checking on an automatic car wash he owned nearby. The record contains no evidence indicating that Mr. Saylor was not where he said he was, however.

maximum permitted under school policy), and he asked Mr. Roark for the latter's paddle.[4]

In Roark's presence, but with Randy waiting outside the office, Saylor paddled Brian five times. Asked whether they were "easy licks or hard licks," Mr. Roark said they were "good licks," licks that Roark thought were "appropriate." Brian was not required to lower his trousers during or after the punishment, but school officials learned the next day that the boy's buttocks had been bruised.

As for Randy, he initially told Roark and Saylor that he did not want to be paddled.[5] Mr. Saylor responded that the boy would not be allowed back in the classroom unless he took his discipline. Randy again said that he wasn't getting paddled, and Mr. Saylor suggested to him that he speak with his mother on the telephone. Randy attempted to do so, but was unable to reach her.

Mr. Saylor returned to his classroom with Brian, but Mr. Roark continued to talk with Randy, urging him to take the paddling. (Roark testified that although Randy's parents had never told him directly they were lifting their prohibition against Randy's being spanked at school, he had understood from Sam Saylor that the boy's father had lifted the prohibition in October. In speaking with Roark, Lee and Sam Saylor after the fight and before the paddling, Randy himself does not appear to have said a word about his parents' current stance on corporal punishment.)

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[4] According to Principal Lee, Sam Saylor was one of the teachers who did not keep a paddle in his room. Randy testified to the contrary. Be that as it may, Mr. Lee testified without contradiction that "Mr. Saylor probably spanked less than anybody in that school just about . . . ."

[5] It is clear that both boys had the option of not accepting this form of punishment. Principal Lee testified that under school policy the student had to agree before corporal punishment would be administered.

Randy still refused the paddling, so Mr. Roark gave him a standard-form letter of suspension. Where the words "Dates of Suspension" were printed on the form, Roark wrote "Parents to school." Mr. Roark explained at his deposition that this meant Randy was to bring his parents to school and would be suspended unless the problem were resolved with the parents.

Sam Saylor came back to the office at some point and told Randy that the other students in the math class were being given a test; that Randy's absence was unexcused; and that he would receive a zero if he missed the test. Randy testified that he was also told he would have to repeat the eighth grade; Sam Saylor denied having made the latter statement, and Mr. Roark testified that he did not recall anything of the sort having been said.

After returning again to his classroom, Mr. Saylor was summoned to the office to take a phone call. Mr. Roark had left on other business by this time, but Randy was still at the office. On seeing Mr. Saylor, Randy asked if it were too late for him to take the paddling. It wasn't, and Mr. Saylor told Randy to find Mr. Lee or Mr. Roark. (The Code of Conduct provided that "[a] teacher or principal must administer corporal punishment in the presence of a second school official.")

Randy went into Mr. Lee's office and informed the principal that he had decided to take the spanking. After finishing a report he was working on, Mr. Lee went to talk with Mr. Saylor.

When Lee found Saylor, according to the latter's testimony, Saylor asked him "do you want to watch me bust Randy's butt." After correcting his language, Lee inquired if Saylor wanted him (Lee) to take care of it. Saylor's response, according to Lee, was, "no . . . I spanked the other boy and it wouldn't be fair if I don't spank him." Randy testified that Saylor responded, "No, this one's mine . . . ." Randy and both his parents further testified that they did not have any reason to believe that

the spanking was for anything other than fighting in the classroom.

Randy, Mr. Lee and Mr. Saylor went into Mr. Roark's office, where the paddle was again taken out of the desk. Randy testified that it was an older paddle, perhaps two and a half or three inches wide and fourteen or fifteen inches long.[6] Randy kept his trousers on, as Brian had done, and Mr. Saylor paddled him three times before being interrupted by the ringing of a telephone. The third blow was so hard, Randy testified, "it's just like it knocked the breath out of me."

The telephone call was for Mr. Lee, who took it in an adjoining office. Mr. Lee had thought the boy was to receive only three licks, he testified, so when he got back from the call he said something to Randy indicating that the punishment was over. Mr. Saylor, however, explained that there were to be five licks in all. Although Randy said that he didn't want to take any more, according to his testimony, Mr. Saylor then administered the final two licks. The first three had been "fairly hard," in Mr. Lee's opinion, but Lee thought that the last ones were "easy." Mr. Lee further testified that Mr. Saylor's attitude was "normal" at the time of the spanking, that Saylor did not seem upset, and that he did not show any hostility.

Randy had started to cry during the spanking, but he composed himself afterwards and went back to class with Mr. Saylor to take the test. The boy wrote only a little, and then told Mr. Saylor that he had forgotten to study the night before and was still shaken up about the paddling.

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[6] According to Randy, Mr. Roark's paddle was longer and narrower than the newer paddles the teachers were supposed to use. Mr. Roark testified that there were two paddle "molds," one for primary grades and one for junior high; the junior high model was a little larger in size. Paddles were often stolen, it appears, and the particular paddle used on Randy could not be found when the boy's father asked for it the following January.

Mr. Saylor told him he could study at home that evening and take the test the next day.

Randy attended the final class of the day and then rode home on the school bus, reaching home around 3:10 in the afternoon. He told his mother about the spanking and showed her his bottom, which was bruised and swollen. (A photograph taken that evening shows a large red area on the right haunch. A smaller and somewhat fainter bruise is visible on the left side.) Mrs. Saylor took Randy to a hospital emergency room, where he was examined but not treated. In retrospect (a phrase we suppose preferable to the more obvious one) the defendants acknowledge that the force used in administering the paddling was excessive.

Randy's father, when he arrived home after work and saw the bruises, got "real mad," as he later testified. Taking out his 12-gauge shotgun and some shells, he put them in his car and drove to the Wallins school with his family. A baseball game was in progress, and Mr. Saylor asked if anyone had seen Sam Saylor or Bill Lee. No one had, apparently, and neither man could be found at his residence. The Saylors returned home, and Mr. Saylor put up his gun.

Mr. and Mrs. Saylor went to the school the next day and made their displeasure known verbally.[7] Randy's father told Lee, Roark and Sam Saylor that they all knew they were not to use corporal punishment on the boy. The father expressed outrage, moreover, that his son should have been punished for defending himself in a fight — something Randy had been taught at home that he should do.

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[7] At a school board meeting the following month, Mr. Saylor was complimented on the way he and Mrs. Saylor had handled the matter. "I know some other people," an unidentified speaker said, "that'd been so mad they'd have went up there and killed." Others expressed their appreciation as well, one remarking that "it shows some class to come down here and take care of it this way instead of going wild."

Randy's father went before a Harlan County grand jury in January, and the grand jury indicted Sam Saylor on an assault charge. The teacher then requested and received an opportunity to testify before the grand jury himself. After hearing what he had to say, and after hearing from Mr. Lee as well, the grand jury issued a final report recommending that the indictment be quashed. The report said that although Randy's injuries "exceed what would have been reasonable and may very well have been negligently inflicted," the grand jury was now satisfied that the actions of the teacher in disciplining the boy did not amount to criminal conduct. In conformity with the grand jury's recommendation, the indictment was subsequently quashed.

Randy may have been the last student to be paddled at the Wallins school, at least for a while. Mr. Lee testified that he told his staff there would be no more spankings in the school — and the state board of education, according to the newspapers, banned corporal punishment throughout Kentucky for most of the 1991-92 school year.

II

Although the final report of the grand jury had hinted that the Saylors might wish to bring a state law negligence action, they elected instead to seek monetary damages in federal court under 42 U.S.C. § 1983 for what was characterized in the complaint as "a cruel and unusual punishment and the brutal, malicious, and excessive infliction of pain and suffering, and a violation . . . of the substantive due process and equal protection rights of this Plaintiff as such are guaranteed and provided under the Constitution and laws of the United States."[8] Pendent state law claims were also asserted, along with claims for declaratory and injunctive relief.

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[8] The equal protection claim has not been pressed in the briefs we have seen, and we assume it has been abandoned.

Pursuant to Rule 12(b)(6), Fed. R. Civ. P., the defendants moved to dismiss the complaint for failure to state a claim upon which relief could be granted. Citing *Ingraham v. Wright*, 430 U.S. 651 (1977), the district court dismissed the portion of the complaint that alleged a violation of the Cruel and Unusual Punishment Clause of the Eighth Amendment. In all other respects the motion to dismiss was denied.

After discovery proceedings, the defendants moved for summary judgment on the remaining claims. The summary judgment motion — which raised a defense of qualified immunity, among other things — was denied, except as to a First Amendment issue not relevant here. The district court subsequently granted an extension of time to let the individual defendants take an interlocutory appeal from the denial of qualified immunity. The court declined a request for findings that would have let the defendant board of education have an immediate appeal under 28 U.S.C. § 1292(b).

III

As stated by the Supreme Court in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), government officials "performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established [federal] statutory or constitutional rights of which a reasonable person would have known." Although the central issue in many qualified immunity cases is whether a particular constitutional right was "clearly established" at the time of the alleged violation — see, *e.g.*, *Walton v. City of Southfield*, 995 F.2d 1331, 1335-36 (6th Cir. 1993), and the cases there cited — there is a threshold question that sometimes proves dispositive. The threshold question is whether a constitutional or statutory violation has occurred at all. See *Siegert v. Gilley*, 500 U.S. 226, 232 (1991); *Purisch v. Tennessee Technological Inst.*, 76 F.3d 1414, 1423 (6th Cir. 1996); *Turner v. Scott*, __ F.3d __, __ (6th Cir. 1997). We turn to this question now.

A

It seems clear to us that the plaintiffs cannot show that either the principal of the school, Mr. Lee, or the assistant principal, Mr. Roark, violated anyone's constitutional rights. The record contains nothing to contradict the evidence that both men had been told by Sam Saylor in October that Randy's father had authorized the school to use corporal punishment — and there is no basis on which a jury could be permitted to find that the principal and assistant principal lacked a good faith belief that the parents' instructions not to paddle Randy had been withdrawn. Against this background, the caselaw leaves no room for doubt that Mr. Lee and Mr. Roark acted within the limits set by the Constitution when they allowed Randy's teacher to paddle him for fighting in the classroom.

As the district court correctly observed in dismissing the plaintiffs' cruel and unusual punishment claim, "[t]he Supreme Court has unequivocally stated that the Eighth Amendment is inapplicable to situations where public school teachers or administrators impose disciplinary corporal punishment. *Ingraham v. Wright*, 430 U.S. 651, 671 (1977)." Because the grant of certiorari in *Ingraham v. Wright* was "limited to the questions of cruel and unusual punishment and procedural due process," *id.* at 659, the Supreme Court had "no occasion [in *Ingraham*] . . . to decide whether or under what circumstances corporal punishment of a public school child may give rise to an independent federal cause of action to vindicate substantive rights under the Due Process Clause." *Id.* at 679 n.47.[9] The courts of appeals are not of one mind on

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[9] In *Brown v. Johnson*, 710 F. Supp. 183 (E.D. Ky. 1989), a decision by the same district court that decided the case at bar, the court held that school officials did not violate the substantive due process rights of a nine-year-old schoolgirl by paddling her seven times with sufficient force to bruise her buttocks severely. In noting that the bruises did not "shock the conscience" of the court — a test

the substantive due process question, but we know of no circuit where the precedents indicate that the conduct of Principal Lee and Assistant Principal Roark could be held unconstitutional.

The Fifth Circuit, which issued the en banc decision reviewed by the Supreme Court in *Ingraham*, takes the view that where state law provides "adequate post-punishment remedies to deter unjustified or excessive punishment and to redress that which may nevertheless occur, the student receives all the process that is constitutionally due." *Woodard v. Los Fresnos Independent School District*, 732 F.2d 1243, 1245 (5th Cir. 1984).[10] Corporal punishment of a public school child, as the Fifth Circuit sees it, simply does not "give rise to an independent cause of action to vindicate substantive rights under the due process clause . . . ." *Id.*, citing *Ingraham v. Wright*, 525 F.2d 909, 916 (5th Cir. 1976) (en banc), *aff'd on other grounds*, 430 U.S. 651 (1977). As the Fifth Circuit said in *Ingraham*,

> "We think it a misuse of our judicial power to determine, for example, whether a teacher has acted arbitrarily in paddling a particular child for certain behavior or whether in a particular instance of

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sometimes used for resolving substantive due process questions — the court repeatedly suggested that in *Ingraham v. Wright* "the Supreme Court found that a severe beating [20 licks with a paddle] and the resulting hematoma [which required the plaintiff to miss 11 days of school] did not shock its conscience." *Brown*, 710 F. Supp. at 186. We believe that the result reached in *Brown* was correct, but the *Brown* court's reading of *Ingraham v. Wright* seems incorrect; the Supreme Court did not address the "conscience shocking" question in *Ingraham*.

[10] Under Kentucky law it is well established that a teacher may be held liable for damages resulting from negligence or deliberate wrongdoing in administering unreasonable or excessive corporal punishment. See *Carr v. Wright*, 423 S.W.2d 521 (Ky. App. 1968). If such punishment is administered maliciously, criminal sanctions may be imposed.

> misconduct five licks would have been a more appropriate punishment than ten licks. We note again the possibility of a civil or criminal action in state court against a teacher who has excessively punished a child." *Id.* at 917 (footnote omitted).

See also *Cunningham v. Beavers*, 858 F.2d 269, 271 (5th Cir. 1988), *cert. denied*, 489 U.S. 1067 (1989) (no substantive due process claim was stated where a teacher and school principal punished girls five and six years old for "snickering," the punishment having consisted of five swats with a wooden paddle and the girls' buttocks having been bruised to an extent that led a local child welfare office to state "the situation clearly constituted child abuse").

In *Hall v. Tawney*, 621 F.2d 607 (4th Cir. 1980) — a decision that our unpublished opinions in *Archey v. Hyche*, 1991 WL 100586, at *2 (6th Cir.), and *Darden v. Watkins*, 1988 WL 40083, at *3 (6th Cir.), both characterized as "seminal" — the Fourth Circuit took a somewhat different view. Citing *Baker v. Owen*, 395 F. Supp. 294 (M.D.N.C.) (three-judge court), *aff'd*, 423 U.S. 907 (1975), where it was held that a parent's constitutional right to control the means of disciplining her child was outweighed by the right of teachers and school officials to employ reasonable corporal punishment in the exercise of their own professional judgment, the Fourth Circuit held that the parents of a child who had been paddled at school against the parents' explicit instructions could not show that their constitutional rights as parents had been violated, even though the paddling was alleged to have been "severe" and not "reasonable." *Hall*, 621 F.2d at 610. The *Hall* court went on to hold, however, that it was error to dismiss, under Rule 12(b)(6), a substantive due process claim asserted by the child herself.

The *Hall* court emphasized that "[i]n the context of disciplinary corporal punishment in the public schools . . . [a] substantive due process claim is quite different than a claim of assault and battery under state tort law." *Id.* at

613. Substantive due process decisions cannot turn on whether ten licks as opposed to five licks would be excessive, for example; substantive due process, the court indicated, is concerned with violations of bodily security of an altogether different order of magnitude. *Id.* Nonetheless, said the court, some tortious school punishments may be "so brutal, demeaning and harmful," so "literally outrageous," as to violate the student's Fourteenth Amendment rights — and in this connection, *Hall* declared,

> "the substantive due process inquiry . . . must be whether the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience." *Id.*

The foregoing passage was quoted by our court with approval in *Webb v. McCullough*, 828 F.2d 1151, 1158 (6th Cir. 1987). *Webb* is not directly in point here, because it involved a battery that was in no way "disciplinary" — and we stressed the importance of distinguishing the type of battery at issue in *Webb* from the disciplinary blows inflicted as punishment in *Ingraham*. There was no indication in the *Webb* record that "the blows arose other than in anger or from malice."[11] *Id.* at 1158. In the case at bar, by contrast to *Webb*, the punishment was administered in school, before an appropriate witness, with consent (at least initially) from the student, and for a purpose that was unquestionably disciplinary. (As we have seen, all three of the plaintiffs in this case acknowledged at their depositions that they had no reason to believe that the spanking was for anything other than the classroom fight.) We take it, nonetheless, that the substantive due process

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[11] In this respect *Webb* bears some resemblance to *P.B. v. Koch*, 96 F.3d 1298 (9th Cir. 1996).

inquiry prescribed in *Hall* and quoted in *Webb* is the appropriate inquiry to make in the case now before us.

In denying the motion to dismiss the Saylors' substantive due process claim under Rule 12(b)(6), the district court observed that although the complaint alleged reasons for the paddling that may have been constitutionally impermissible, "[t]he physical punishment itself was disciplinary, and does not shock this court's conscience." We agree.

The record developed after denial of the 12(b)(6) motion may well reflect carelessness or an unwise excess of zeal on Sam Saylor's part, but we have no hesitancy in saying that, as a matter of law, the bruises caused by the five licks of the paddle on Randy Saylor's fully clothed buttocks were not "so severe . . . so disproportionate to the need presented, and . . . so inspired by malice or sadism . . . that [the paddling] amounted to a brutal and inhumane abuse of official power literally shocking to the conscience." Our conclusion on this matter is consistent with the conclusions we reached in *Archey* (no substantive due process violation where a fifth grader suffered severe bruises on being paddled five times for humming in the boys' bathroom) and in *Darden* (no substantive due process violation where a fourth grader who had allegedly failed to do his homework received two or three licks with a paddle and was found by an emergency room physician to have been bruised over a three-to four-inch area of the fleshy part of his left buttock).[12]

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[12] The plaintiffs argue on appeal that the paddling could not have been administered as punishment for the fight, and was thus necessarily impermissible, because Randy had already been punished by being suspended. The school officials viewed suspension as a harsher punishment, however, and assuming that the suspension had really started — a point that is in dispute — it is perfectly clear that the suspension was to be revoked if Randy took the paddling. Randy went back to class after the paddling, it will be recalled, and he would not have done so had he been under suspension.

It does not necessarily follow from what has been said so far that there was no violation of anyone's constitutional rights by Sam Saylor, as opposed to Messrs. Lee and Roark. There is a genuine issue of fact as to whether Randy's father authorized Sam Saylor to administer corporal punishment. If the father did not do so — and we must assume, for present purposes, that he did not — Sam Saylor violated the regulations codified in the Harlan County Schools Code of Conduct by spanking Randy against the parents' express wishes. Although, as discussed above, the spanking *per se* did not constitute a due process violation, it is arguable that the presumed violation of the regulations did. See *Franklin v. Aycock*, 795 F.2d 1253, 1260 (6th Cir. 1986), and *Spruytte v. Walters*, 753 F.2d 498, 506-07 (6th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986), prison inmate cases cited by the district court in support of the proposition that the Code of Conduct gave rise to a constitutionally protected liberty interest.[13]

Assuming, for purposes of analysis, that Sam Saylor did violate young Randy's constitutional rights — and perhaps those of his parents as well — we are not persuaded that the rights in question were so clearly established as *constitutional* rights that a reasonable teacher in Mr. Saylor's position would have had to realize that a violation of the Code of Conduct would violate the United States Constitution as well.

For a constitutional right to be clearly established, as this court has repeatedly noted, "the law must be clear in

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[13] *Hewitt v. Helms*, 459 U.S. 460 (1983), on which *Franklin* and *Spruytte* relied in large measure, endorsed a methodology that has now been repudiated in the prison context. See *Sandin v. Conner*, 115 S.Ct. 2293 (1995). Arbitrary corporal punishment in public schools implicates other constitutional considerations, however, see *id.* at 2300-01, and *Sandin* does not rule out the possibility that corporal punishment of a school child may be "arbitrary," in a constitutional sense, if administered in clear violation of school regulations.

regard to the official's particular actions in the particular situation." *Long v. Norris*, 929 F.2d 1111, 1114 (6th Cir.), *cert. denied*, 502 U.S. 863 (1991); *Walton*, 995 F.2d at 1335. "Thus, the particular conduct of the official must fall clearly within the area protected by the constitutional right, such that a reasonable official would have known that his or her conduct violated the constitutional right." *Walton*, 995 F.2d at 1336, citing *Long*, 929 F.2d at 1115. "For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law *in the circumstances.*" *Lassiter v. Alabama A&M Univ., Bd. of Trustees*, 28 F.3d 1146, 1150 (11th Cir. 1994) (en banc) (emphasis in original).

We are aware of no pre-existing law "dictat[ing]" the conclusion that a disciplinary paddling administered by a school teacher in violation of school regulations would *ipso facto* violate federal constitutional law. And this conclusion was squarely rejected in *Woodard*, where the plaintiff, a schoolgirl who was paddled for using abusive language, argued that an assistant principal's violation of the school's parental consent regulation constituted a substantive due process violation. 732 F.2d at 1245. The Fifth Circuit dismissed the girl's argument as simply "semantic." *Id.* at 1246. Notwithstanding the assistant principal's clear violation of the parental consent regulation, the court held, the paddling "presents neither arbitrary and capricious state action nor inhumane and shocking abuse of official power." *Id.*

If the United States Court of Appeals for the Fifth Circuit is unable to equate a regulatory violation with a constitutional violation in this factual context, we are at a loss to see how an eighth-grade school teacher could be expected to do so. If Sam Saylor knew that the parental prohibition against spanking Randy Saylor was still in force, Sam obviously knew that he was violating the Code of Conduct by administering the paddling. He also knew,

no doubt, that he was exposing himself to an action in the Kentucky courts. Perhaps he knew that he was running a risk of more direct action by an irate parent. That Sam Saylor had to have known that he was also violating the United States Constitution, however, is a proposition we cannot accept.

The order of the district court denying qualified immunity is **REVERSED**, and the case is **REMANDED** with instructions to enter judgment in favor of each of the individual defendants.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 538
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

LEONARD GREEN
CLERK

TELEPHONE
(513) 564-7000

July 22, 1997

William D. Stark, Jr.
Durenda L. Lawson
Winter R. Huff
Susan C. Lawson

Re: Case No. 95-5319
Randy Saylor, Sr., et. al. v. Board of Education
of Harlan County, Kentucky, et. al.
District Court No. 91-00280

Dear Counsel:

The court today announced its decision in the above-styled case.

A copy of the court's opinion is enclosed and a judgment in conformity with the opinion has been entered today as required by Rule 36, Federal Rules of Appellate Procedure.

Yours very truly,

Leonard Green, Clerk
By. Linda K. Martin
Deputy Clerk

Enclosure
swh

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON

CIVIL ACTION NO. 91-280

RANDY SAYLOR, SR., ET AL — PLAINTIFFS

VS. — OPINION & ORDER

HARLAN COUNTY BOARD OF EDUCATION, ET AL. — DEFENDANTS

I. INTRODUCTION

Plaintiffs, Randy Saylor, Sr. and Debbie Saylor, filed the instant action on behalf of their minor son, Randy Saylor, Jr. (hereafter "Randy"), pursuant to 42 U.S.C. 1983, alleging that Defendants, Samuel Saylor, Jimmy Roark, William Lee and the Harlan County Board of Education, violated rights guaranteed by the first, Eighth and Fourteenth Amendments in imposing discipline on Randy.[1] This matter is before the Court on Defendants' renewed motion for summary judgment. (Doc. No. 64). Oral argument was held on the motion on November 4, 1994, in Lexington, Kentucky. For the reasons set forth below, Defendants' motion (Doc. #64) be, and it is, granted in part and denied in part.

II. FACTUAL BACKGROUND

In December, 1990, Randy was an eighth grade student

1 In an order dated January 6, 1992, Judge Hood dismissed the Eighth Amendment claim on the basis that under Ingraham v. Wright, 430 u.S. 651, 657 (1977), the Eighth Amendment does not apply to disciplinary corporal punishment in the schools.

at Wallins Elementary School in Harlan County. On December 12, 1990, Randy was involved in an altercation with another student while waiting for math class to begin. Jimmy Roark, the school's vice principal, broke up the fight and took both boys to the principal's office. When the teacher, Defendant Saylor, learned of the fight, he went to the principal's office. He informed the boys that they would be paddled for fighting. Randy objected to the punishment. Randy was told that he could either take the paddling or be suspended from school. Randy initially preferred suspension.

Randy was sent to another part of the principal's office and unsuccessfully attempted to call his parents while Saylor paddled the other boy. Randy claims that, thereafter, Saylor, Roark, and Principal William Lee, coerced him into accepting the punishment. Randy claims that he was told that a math test was being given and that he would receive a "0" on the test. In addition, Saylor allegedly stated that there was a possibility that the suspension would result in Randy having to repeat the eighth grade. Randy eventually told Saylor that he would agree to be paddled.

At the time that Randy agreed to accept the punishment, saylor was alone in the principal's office. School board policy required that all paddlings be witnessed by a second school official. Therefore, Saylor sought out Principal Lee to see if Lee would watch him "bust Randy's butt." Subsequently, Saylor struck Randy five times with a wooden paddle. Randy claims that by the third blow, he was in obvious pain and requested that the paddling be discontinued. Although Defendants dispute that Randy requested Saylor to stop after he was struck the third time, it is undisputed that by that time, Randy was in tears or near tears.

The paddling resulted in severe bruising of Randy's buttocks. All parties agree that the blows that were inflicted were hard. Lee acknowledged that bruising was excessive and,

in hindsight, the paddling was beyond the punishment normally inflicted. Randy claims that Saylor acted with an improper motive and maliciously in imposing the discipline. Plaintiffs argue that Saylor struck Randy much harder than necessary in retaliation for Randy objecting to the imposition of punishment. In addition, Plaintiffs argue that Saylor inflicted unnecessary punishment in order to be able to continue an independent business during school hours, a venture he was allegedly pursuing at the time the fight occurred when he should have been in class.

The Code of Conduct for the Harlan County School System permits coproral punishment. Parents are informed, however, that they have the right to object to the use of corporal punishment on their children. Plaintiffs claim that they notified Lee and Roark during the 1989/90 school year, after Randy was bruised from a paddling, that they would no longer consent to corporal punishment. The parties dispute whether the prohibition against the use of corporal punishment was ever lifted by Randy's parents.

The day after the paddling incident, Plaintiffs accompanied Randy to school to complain about the use of corporal punishment and the severeity of the discipline. Plaintiffs informed Lee that they refused to have their son receive classroom instruction from Saylor and requested that alternative arrangements be made. On January 9, 1991, Plaintiffs attended a meeting of the Harlan County Board of Education to protest the discipline and to object to the lack of classroom instruction Randy was receiving. The Board members concluded that the paddling was excessive and that if, as Palintiffs allege, they had voiced their objection to the use of corporal punishment, Defendants had violated school board policies.

III. ANALYSIS

1. Improper Motivation In Inflicting Punishment.

Plaintiffs argue that Saylor acted with malice in inflicting the corporal punishment in this case. In order to establish a substantive due process violation, Plaintiffs must show that the punish-

ment was "arbitrary, capricious, or wholly unrelated to the legitimate goal of maintaining an atmosphere conducive to learning." Woodard v. Los angeles Indep. Sch. Dist., 732 F.2nd 1243, 1246 (5th Cir. 1984). The inquiry must be whether "the force applied cause injury so severe, was so disproportionate to the need presented, and was inspired by malice or sadism . . . that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience." Webb v. McCullough, 828 F.2d 1151, 1158 (6th Cir. 1987).

There is no dispute that Saylor asked Lee if Lee wanted to watch him "bust Randy's butt." There is also no dispute that the blows that were inflicted were hard enough to bring Randy to tears, but that the paddling was not stopped. Lee stated that he had never seen Saylor bring a child to tears during a paddling on any other occasion. Furthermore, all Defendants agree that the bruising that resulted was excessive and that the punishment was greater than normally inflicted. Saylor, in fact, stated that he was shocked when he saw Randy's bruises. The members of the school board considered the paddling excessive. On the basis of the record, there remains an issue of material fact regarding whether Saylor acted with malice and an improper motivate in inflicting corporal punishment. Defendants' motion for summary judgment on this issue is, therefore, denied.

2. The Code of Conduct Gives Rise To A Liberty Interest.

The parties do not dispute the fact that it would be a violation of school board policy to inflict corporal punishment on a student after a parent exercised his right to prohibit such punishment, even if the student consented to the discipline. The issue, therefore, is whether the policy promulgated by the school district gives rise to a liberty interest protected by the Fourteenth Amendment.

A state may create a protected liberty interest through the enactment of statutes, rules, regulations or policies. Franklin v. Aycock, 795 F.2d 1253, 1260 (6th cir. 1986). "[A] state creates a protected liberty interest by placing substantive limitations on official discretion." Spruytte v. Walters, 753 F.2d 498, 507 (6th Cir. 1985), cert. denied, 474 U.S. 1954 (1985) (quoting Olim v. Wakinekona, 461 U.S. 238, 249 (1983)). In determining whether a rule or regulation gives rise to a liberty interest, courts focus on the mandatory nature of the language in the rule or regulation at issue. In Washington v. Starke, 855 F.2d 346 (6th Cir. 1988), the court stated: "The mandatory nature of the regulation is the key, as a plaintiff 'must have a legitimate claim of entitlement to the interest, not simply a unilateral expectation of it.'" Id. at 349 (citation omitted) (emphasis in original).

The corporal punishment policy adopted by the school board was mandatory. The policy withdrew all discretion from school officials in deciding whether to impose corporal punishment once a parent followed appropriate procedures in objecting to the punishment. Thus, assuming that Plaintiffs can establish that they withheld consent, the violation of the policy states a valid claim for a violation of due process.

3. The Individual Defendants Are Not entitled to Qualified Immunity.

Defendants contend that even assuming that Plaintiffs' claims give rise to a cause of action under substantive due process, Defendants are, nonetheless, entitled to qualified immunity. The Court disagrees.

In circumstances in which a plaintiff establishes that a regulation gives rise to a liberty interest, the courts employ the general standard of "clearly established statutory or constitutional rights of which a reasonable person would have known" in determining whether an official is entitled to qualified immunity. Spruytte v. Walters, 753 F.2d at 510 (quoting Harlow v.

Fitzgerald, 457 U.S. 800, 818 (1982).[2] The plaintiff has the burden of demonstrating that any official in the defendant's position would have understood they were under an affirmative duty to refrain from committing the conduct of which the plaintiff complains. Walton v. City of Southfield, 995 F.2d 1331, 1341 (6th Cir. 1993).

At the time of the actions complained of in this case, the law was clearly established that a failure to follow internal rules and regulations could give rise to a substantive due process violation. Washington, 855 F.2d at 349: Franklin, 795 F.2d at 1260; Spruytte, 753 F.2d at 507. Defendants concede that if Plaintiffs did not withdraw their prohibition against use of corporal punishment, Defendants were obligated to refrain from imposing corporal punishment. Thus, a reasonable official would have realized that he should refrain from inflicting corporal punishment and, therefore, Defendants are not entitled to qualified immunity on Plaintiffs' claim that they violated school board policy.[3]

4. The School Board can Be Held Liable For Misconduct of Its Officials.

The school board contends that it is entitled to summary

[2] The precendent in the Sixth Circuit that addresses immunity in light of internal policies or regulations has arisen in the criminal or police brutality contexts. Courts, however, have frequently incorporated police brutality standards into their substantive due process analysis in the corporal punishment context. See, e.g., Webb, 828 F.2d at 1158 (quoting Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980)).

[3] The fact that Roark was not present at the time the punishment was inflicted does not entitle him to immunity. It is undisputed that he encouraged Randy to accept the paddling. Liability can be imposed on a supervisor who, at least implicitly, authorized, approved or knowingly acquiesced in the unconstitutional conduct of a subordinate. Walton, 955 F.2d at 1341; see also Norris v. Davis, 826 F. Supp. 212, 217 (W. D. Ky. 1993) (supervisory officials can be held liable if they encourage or participate in misconduct).

judgment because a municipality or body of local government cannot be held liable for the misconduct of its officials on the basis of the doctrine of respondeat superior. Monell v. New York City Dep't of Social Serv., 436 U.S. 658, 694 (1978). A municipality can, however, be held liable under 1983 if the plaintiff can demonstrate that a policy or custom of the municipality caused the injury. Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 113 S. Ct. 1160, 1162 (1993). To establish a municipal policy, the plaintiff must show: (1) the municipality officially sanctioned or ordered the challenged action; (2) the actor or decisionmaker had final policymaking authority under state law; and (3) the actor or decisionmaker had final policymaker authority in the city's business in question. City of St. Louis v. Praprotnick, 485 U.S. 112, 123 (1988) (citing Pembaur v. Cincinnati, 475 U.S. 469, 482-83 (1986)).

An unconstitutional policy may be "inferred from a single decision taken by the highest officials responsible for setting policy" if the official has authority to make final policy. Praprotnick, 485 U.S. at 123.

> When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departure from them, are the act of the municipality. Similarly, when a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with their policies. If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final.

Id. at 127.

Under the terms of the Harlan County Code of Conduct, parents are to notify the school principal if they object to corporal punishment in order to develop an alternative course

of action in the event that disciplinary problems arise. Further, the Code of Conduct provides that the principal is responsible for ensuring that all due process procedures are followed in cases involving staff and students. The principal is responsible for providing parents with information regarding the School Board's Code of Conduct. According to David Kennedy, a member of the Harlan County School Board, each principal at the schools within the county are the primary policymaking personnel responsible for ensuring that the policies adopted by the Board are carried out.

Under the facts of this case, the principal, William Lee, was the school board's final policymaker with regard to the use of corporal punishment. Lee was present and acquiesced in Saylor's conduct in imposing corporal discipline on Randy. Accordingly, the decisions made by Principal Lee with respect to the imposition of corporal punishment constitute actions of the school board, and his ratification of the punishment is chargeable to the school board because Lee had the final decision in implementing the board's policies. The school board, therefore, is not entitled to summary judgment on Plaintiff's claim for violation of school board policy.

5. Defendants Are Entitled To Summary Judgment On Plaintiffs' First Amendment Claim.

Plaintiffs argue that after the paddling incident, Defendants retaliated against Randy by denying him a proper education because Plaintiffs exercised their First Amendment right in voicing opposition to the imposition of corporal punishment and the severity of the punishment. In order to prevail on the First Amendment claim, Plaintiffs are required to demonstrate that their speech touched on a matter of public concern. Connick v. Myers, 461 U.S. 138, 169 (1983). In the First Amendment context, a distinction must be drawn between personal challenges to the application of a school policy and challenges to procedures in general. DePree v.

University of Kentucky, Nos. 88-5755, 88-5798, 1989 WL 98707, *2 (6th Cir. 1989).

The Court finds that Plaintiffs' complaints to the school board were a personal challenge to the imposition of punishment in this particular case. Plaintiffs do not suggest that they were protesting the corporal punishment policy. To the contrary, Plaintiffs were simply expressing their private concern over the treatment of their son. Thus, Plaintiffs have not carried their burden of demonstrating speech on a matter of public concern and, therefore, Defendants are entitled to summary judgment on this issue.

Therefore, the court being advised,

IT IS ORDERED as follows:

1. That the motion of Defendants to dismiss Plaintiffs' Fourteenth Amendment claim be, and it is, **denied**;

2. That the individual Defendants are not entitled to qualified immunity;

3. That the school board's motion for summary judgment is **denied**;

4. That Defendants' motion for summary judgment on Plaintiffs' First Amendment claim be, and it is, **granted.**

5. That the individual Defendants shall advise the court, in writing, within **fifteen (15) days** of the date of this order if they are going to take an interlocutory appeal on the denial of qualified immunity. On receipt of such advice, the case shall be held in abeyance pending the outcome of the interlocutory appeal.

This 27th day of December, 1994.

William O. Bertelsman, Chief Judge

(2)

No. 97-0677

Supreme Court, U.S.
FILED
NOV 14 1997
CLERK

In The

Supreme Court of the United States

October Term, 1997

RANDY SAYLOR, SR., suing individually and DEBBIE SAYLOR, suing individually and as Next Friend of RANDY SAYLOR, JR., an infant,

Petitioners,

vs.

SAM B. SAYLOR, JIM ROARK, and WILLIAM A. LEE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Petitioners seek review by this Court of the following question as framed by Petitioners:

> Are a state public school teacher and other school officials entitled to claim and receive qualified immunity or exoneration for their acts and conduct under federal civil rights law, if such individuals admit that they knowingly violated the published policy and regulations of the school system by acting or causing the corporal punishment of a pupil in violation of such policy, and if such individuals admit that excessive force was used for such punishment with resulting injury to such pupil?

PARTIES TO THE PROCEEDING

The parties to this proceeding are as named on the Petition and in this Brief in Opposition. None of the Respondents are subsidiaries or affiliates of publicly-owned corporations, nor do any publicly owned corporations have a financial interest in the outcome herein.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Sam B. Saylor (teacher), Jim Roark (assistant principal) and William A. Lee (principal), by counsel, respectfully request that the Court deny the Petition for Writ of Certiorari seeking review of the July 22, 1997 Opinion rendered by the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is to be reported in 118 F.3d 507 (1997) and appears as Appendix A of the Petition. The Opinion and Order of the United States District Court for the Eastern District of Kentucky entered on December 29, 1994, is unpublished, but appears as Appendix B of the Petition.

JURISDICTION

Petitioners invoke this Court's Jurisdiction pursuant to 28 U.S.C. Section 1254(1).

RESPONDENTS' STATEMENT OF THE CASE

The Respondents herein, comprised of the teacher, assistant principal and principal involved in administering corporal punishment to a student, do wish to correct

and clarify certain statements of the Petitioners. Specifically, the Petitioners have mischaracterized the operative school Code of Conduct, their own actions and the actions of the Respondents.

Randy Saylor Jr., an eighth grade student in the Harlan County School System at the relevant time, was admittedly involved in a fight at school. A copy of the Code of Conduct then in effect in the Harlan County School System is attached hereto as the Appendix (hereinafter abbreviated as "App."). Fighting is defined therein as a "major misbehavior" and both corporal punishment and suspension are among the authorized consequences. App. pp. 25-7. The Code includes the following explanation of the consequences of misbehavior: "A range of consequences has been provided for each incident of misconduct. The range is offered in order to provide school personnel with some flexibility in dealing with unacceptable behavior." App. p. 21.

The Code also addresses corporal punishment in some detail. In relevant part, the Code provides:

> In case of parental objection to corporal punishment an alternative course of action will be determined through a conference with the principal, referring teacher, parent(s) and student. If parents object to corporal punishment, it is their responsibility to notify the proper school official upon enrollment of the student. It may be necessary to remove the student from the class/ school until the parent(s) can be notified for a conference. (App. p. 11).

The parent Petitioners had objected to the administration of corporal punishment during the prior school

year, not upon enrollment of Randy, Jr. during the School year in question. Their objection had resulted from a paddling administered by another teacher, not the teacher-Respondent herein.

The teacher-Respondent Sam B. Saylor and the parent-Petitioner Randy Saylor, Sr. (no relation) disagree over whether the parental objection continued into the school year at issue. Teacher Saylor had met with parent Saylor earlier during the relevant school year in conference over a prior disciplinary problem, and teacher Saylor recalled that parent Saylor told him, "[i]f he gives you any more problems . . . I'm telling you to bust his ass . . . if that don't do any good . . . you call me . . . I'll take you [son] in front of that class and take my damned belt off and wear your ass out in front of that class." Petition, App. A-4. Parent Saylor essentially acknowledged the latter directive, but not the former. Petition, App. A-4, A-5. Parent Saylor did admit his own use of corporal punishment on his son. *Id.*

Whether the parent did or did not in fact authorize the use of corporal punishment during the school year in question, regardless, clearly the teacher sincerely believed the parent had authorized its use, because the teacher so reported that to the principal and the assistant principal months before the fighting infraction which led to the use of corporal punishment. In other words, teacher Saylor, contemporaneous with the parent conference and independent of the circumstances of this action, told both the principal and assistant principal of the communication with the parent Saylor which the teacher Saylor understood to be authorization to use corporal punishment. *Id.* Therefore, contrary to the question as

presented by Petitioners, there has been no admission of a knowing violation of the school policy concerning corporal punishment.

There is also some question as to whether the student Saylor protested the administration of corporal punishment because of the desires of his parents as alleged by Petitioners. The Respondents understood that Randy changed his mind and decided to accept corporal punishment instead of suspension because he would otherwise receive a "zero" on a test. Petition, App. A-7, A-8. Principal Lee testified the student also indicated he decided he would prefer corporal punishment because he did not want his father to find out he was in trouble again at school. In any event, there is no indication in the record that the student mentioned parental objection at the relevant time; he had been present during the prior parent/teacher conference when corporal punishment had been discussed. Similarly, the evidence on behalf of Respondents does not suggest that the student was coerced in any way, but rather made a legitimate decision based upon relative consequences of corporal punishment compared to suspension or parental conference. The student was fourteen years old at the time.

The Petitioners' statement to the effect that student Saylor was also suspended (in addition to corporal punishment) is likewise misleading. As the Code of Conduct specifically provides, when corporal punishment is not the chosen consequence then the student may be removed from school until a conference can be arranged with the parents. The "suspension" form given to student Saylor before he decided to take the corporal punishment provided for just that, indicating no specific days or dates

of suspension, but rather that the student's parents were to come to school. Petition, App. A-8. Regardless, as the Sixth Circuit Court of Appeals noted, "it is perfectly clear that the suspension was to be revoked if Randy took the paddling." Petition, App. A-17, fn.12. Randy did not experience the consequences of a suspension; he was allowed to make up the test and return to class immediately following the administration of corporal punishment.

The Petitioners themselves have acknowledged that they knew of no reason for the administration of the paddling other than as punishment for fighting in school. The Petitioners themselves have acknowledged that the "injury" from the paddling "was not severe." Petition, p. 5, App. A-8, A-9.

The Petitioners have also mischaracterized the proceedings below. The United States District Court for the Eastern District of Kentucky did not determine that there in fact had been a knowing violation of the Code of Conduct by the Respondents as alleged by Petitioners (Petition, p. 10). Rather, the Court stated that if the Petitioners could show they withheld consent, the violation of the Code of Conduct would state a claim for violation of due process (the Court found the corporal punishment policy mandatory, withdrawing "all discretion from school officials in deciding whether to impose corporal punishment once a parent followed appropriate procedures in objecting to the punishment.") Petition, App. C-5.

As to the Petitioners' references to post-paddling events, these allegations are beyond the scope of the very

question which the Petitioners themselves have stated for review. Suffice it to say, the Respondents have denied any retaliatory conduct towards the Petitioners.

ARGUMENT ON BEHALF OF RESPONDENTS

THE RESPONDENTS ARE ENTITLED TO QUALIFIED IMMUNITY BECAUSE THE ALLEGED "RIGHTS" WERE NOT CLEARLY ESTABLISHED

The primary difference between the decision of the District Court and the Sixth Circuit Court of Appeals concerns whether it was clearly established that the student had constitutional rights under the Code of Conduct which a reasonable official would have known would be violated if corporal punishment was administered in spite of parental objection. Cp./cf. Petition, App. C-5, C-6, A-18, A-19.

The key to the first issue is whether it was clearly established that a violation of the Code of Conduct was a violation of a constitutional right; whether a reasonable school official would be so aware. As the Sixth Circuit explained, referring to *Woodward v. Los Fresnos Independent School District*, 732 F.2d 1243 (5th Cir. 1984), "[i]f the United States Court of Appeals for the Fifth Circuit is unable to equate a regulatory violation with a constitutional violation in this factual context [a school paddling case], we are at a loss to see how an eighth-grade school teacher could be expected to do so." Petition, App. A-19.

The applicability of qualified immunity in the context of alleged regulatory violations is not, as this Court has indicated, "an exact science." *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454, 462, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989). For a regulatory violation to give rise to a constitutional violation of a liberty interest, the regulation must be mandatory and a particular outcome must follow. *Id.*, 490 U.S. at 462-3, *Hewitt v. Helms*, 459 U.S. 460, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983). Each case must necessarily be determined on its own facts. Not surprisingly, the outcome varies depending largely upon the subject and wording of the particular regulation involved. A review of the relevant decisions demonstrates that Courts have struggled with whether the language of the statute/regulation is mandatory; whether a particular substantive outcome is mandated; whether a party has a legitimate expectation that a particular result will follow from a particular, required action. *E.g., Tony L. v. Childers*, 71 F.3d 1182 (6th Cir. 1995).

In order for an alleged right to be "clearly established" for purposes of abrogating qualified immunity, that very right at issue must have been clearly established as a constitutional right. *Davis v. Scherer*, 468 U.S. 183, 194, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984). "Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision." *Id.*

There are no known cases holding that violation of school system policy on the administration of corporal punishment constitutes a violation of a constitutional right. To the contrary, as pointed out by the Sixth Circuit, that claim had been specifically rejected in *Woodward*,

supra. The District Court relied upon prison regulation cases (*Franklin v. Avcock*, 795 F.2d 1253, 6th Cir. 1986; *Spruytte v. Walters*, 753 F.2d 498, 6th Cir. 1985) and a decision involving a Michigan police "fleeing felon" procedures (*Washington v. Starke*, 855 F.2d 346, 6th Cir. 1988) in reaching the conclusion that a violation of the corporal punishment policy would state a claim for violation of due process. In so doing, the District Court overlooked the requirement that "the law must be clear in regard to the official's particular actions in the particular situation." *Long v. Norris*, 929 F.2d 1111, 1114 (6th Cir.), *cert. denied*, 502 U.S. 863 (1991); *Walton v. City of Southfield*, 995 F.2d 1331, 1336 (1993). The cases relied upon by the District Court certainly did not clearly establish rights concerning corporal punishment of which a reasonable school official would be aware.

NO CONSTITUTIONAL RIGHTS WERE VIOLATED

Another difference between the two decisions below is whether there was a substantive due process violation at all. Both Courts agreed that the punishment was disciplinary, and did not "shock the conscience." Petition, App. A-17. The District Court, however, left the matter open due to the Petitioners' allegations of malice; the Sixth Circuit Court of Appeals properly found the record devoid of any evidence of malice in the administration of the punishment, and the circumstances of this case consistent with a number of (more egregious) corporal punishment cases holding that there was no substantive due process violation. *Id.*

The Petitioners seem to miss the point entirely; the qualified immunity issue is not even reached if there is no substantive due process violation in the first place. *Siegert v. Gilley*, 500 U.S. 226, 231-234, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991), *reh. denied*, 501 U.S. 1265, 111 S.Ct. 2920, 115 L.Ed.2d 1084 (1991). Further, even if the teacher did act with malice, nevertheless, if the teacher did not violate a constitutional right, the malice is immaterial. *Id.*, 500 U.S. at 234. The availability of qualified immunity does not depend on the actor's subjective state of mind, as the test is an objective one. *Graham v. Connor*, 490 U.S. 386, 397, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989); *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). If the test were subjective, then the Respondents would still be entitled to qualified immunity, because it is uncontroverted that all three believed in good faith that the parent Randy Saylor, Sr. had authorized the teacher Sam B. Saylor to administer corporal punishment on the student Randy Saylor, Jr.

The Petitioners have admitted that the corporal punishment was administered for disciplinary purposes. The Petitioners have admitted that while the paddling did result in bruising, the injury was not severe. Thus, the paddling itself did not constitute a violation of any constitutional rights. *Ingraham v. Wright*, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977).

It is also submitted that the school policy in question did not create any rights of constitutional dimensions, or at least not under the facts of this case. First, the parents did not themselves follow the policy as they did not object to corporal punishment upon enrollment of their son during the school year in question. Second, the policy

does not guarantee a particular substantive outcome; the school officials do retain discretion and flexibility under the policy even if the parents do properly and timely object to corporal punishment.

Further, even if the policy did create a constitutional right, it was not violated by the Respondents. There had been a parental objection to corporal punishment in the past. Disciplinary problems continued and there was a parent/teacher conference. Following that conference, the teacher believed he had been authorized to administer corporal punishment, and he communicated that authorization to the principal and assistant principal. The student did not resist corporal punishment based on parental objection. The student was informed of his options, the consequences of those options, and ultimately himself chose corporal punishment.

Finally, as addressed above, any rights arising under the school Code of Conduct were no so "clearly established" as to abrogate qualified immunity.

CONCLUSION

Wherefore, for all of the foregoing reasons, it is respectfully requested by Respondents that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

HARLAN COUNTY BOARD OF EDUCATION

EDUCATION
BUILDS
KNOWLEDGE

MOUNTED ROUTE I
HARLAN, KENTUCKY 40831
PHONE (606) 573-4330

ROBERT W. SHEPHERD
SUPERINTENDENT

CODE OF CONDUCT

Harlan County Schools

HARLAN COUNTY SCHOOLS
DISCIPLINE CODE

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BOARD OF EDUCATION
and
SUPERINTENDENT'S MESSAGE

It is an honor for us to have been elected by the citizens of Harlan County to serve in this important role. The children are our most precious resource. It is both pleasure and obligation to insure that the students receive the excellent in education which they deserve. As

you rear your children and instill in them an appreciation for learning, we too, take pride in knowing we are striving to provide good teachers and to improve the physical environment of the Harlan County Schools.

Kentucky Law (KRS 160.290) provides, "Each board of education shall have general control and management of the public school in its district . . . and each board shall exercise generally all powers in the administration of its public school system, . . . each board shall make and adopt, and may amend or repeal, rules, regulations and bylaws for its meetings and proceedings for the government, regulation and management of the public schools and school property of the district, for the transaction of its business, and for the qualification and employment of teachers and conduct of pupils . . . "

Every day that school is in session there is something being taught that is a part of the total education of the student. The student has the responsibility of being in class on time and using the time wisely. We have the responsibility of making the instructional program more meaningful.

All of us have responsibilities, all of us have rights. The majority of our young people practice the proper self-discipline. However, rules, including legal restrictions, are necessary. Expected behavior is outlined in this document. Through unified effort the process of education runs smoothly and progressively.

We appreciate the individuals who so kindly served as a committee to review and revise this code.

The Harlan County Board of Education
and

/s/ Robert W. Shepherd
Superintendent of Schools

HARLAN COUNTY BOARD OF EDUCATION
HARLAN, KENTUCKY

Benny Dale Coleman, Chairman
David Clay Lewis, Vice Chairman
Ronnie Ball
Willie Enix
Garry Henson
Robert W. Shepherd, Superintendent

"The Harlan County Board of Education does not discriminate on the basis of sex in the educational programs or activities which it operates, and is required by Title IX of the Educational Amendments of 1972 (P. L. 92-318), not to discriminate in such a manner. Further, the Board of Education does not discriminate on the basis of handicap, in treatment, admission, or access to, or employment in, its programs or activities, as required by the Rehabilitation Act of 1973 (P. L. 93-112), as Amended, Section 504; nor does the Board of Education discriminate on the basis of race, color, national origin, religion, creed, or martial [sic] status, in the education programs or activities it operates."

The intent of the Disciplinary Code of the Harlan County Schools is to provide a positive school climate, provide a clear set of proper school discipline regulations, establish uniform guidelines for the administering of corrective measures for infractions of the code, and classify the due process procedures as related to the code.

DEVELOPMENT, REVIEW AND ORIENTATION PROCEDURES OF CODE OF CONDUCT AND RIGHTS AND RESPONSIBILITIES

DEVELOPMENT – A committee composed of school central office staff, principals, teachers, parents, students and interested citizens developed this document. It was then adopted by the local Board of Education.

REVIEW – This Code of Conduct and Rights and Responsibilities shall be reviewed/revised on an annual basis within one month of the ending of the school term by the Code of Conduct Committee.

ORIENTATION – The principal of each school will set a date and time within the first week of the school year for annual orientation of the Code of Conduct and Rights and Responsibilities for teachers, parents, and students. A copy of the Code will be given to each student.

MEMBERS OF THE COMMITTEE

Clarence T. Scott – Chairman and Contact Person, 573-4330

Suzanne Barrett	Josh Hensley	Kale Saylor
James Burkhart	Wallace Napier	Grace Ann Tolliver
Roland Cornett	Dillard Prater	Robin Allen
Stephanie Daniels	Harold Madden	Diana Creasey
Nancy Bryant	Eugene Stagnolia	

PHILOSOPHY

It is the intent of the Harlan County Board of Education to prepare students to fulfill positive roles in society. That this may be accomplished, a school climate in which there exists respect and trust between students, teachers, administrators, and parents/guardians is an absolute necessity. To ensure that federal and state laws which guarantee rights and freedoms to every citizen, this code of conduct has been developed. At the same time every citizen has the responsibility to respect the identical rights of others. For students to have a successful educational experience, they must understand that individual rights and responsibilities go hand in hand. In this regard, the student discipline code becomes an integral component of the education process and a symbol of the committment of parents, students and administrators to the maintenance of an effective learning environment.

STUDENT GRIEVANCE PROCEDURES

The Harlan County Board of Education has established and adopted a Communications and Grievance Procedure. This procedure is to be used by students, teachers, parents, principals or any member of the community who has any question on the rules and regulations or policies of the Board; or any communication they wish to present to the board. Appropriate forms may be obtained in the principal's office.

ATTENDANCE REQUIREMENTS

A. 159.010 Parent or custodian to send child to school; age limits for compulsory attendance; written notification sixty days prior to withdrawal counseling session required.

(1) Except as provided in KRS 159.030, each parent, guardian or other person residing in the state and having in custody or charge any child between the ages of six (6) and sixteen (16) shall send the child to a regular public day school for the full term that the public school of the district in which the child resides is in session, or to the public school that the board of education of the district makes provision for the child to attend. A child's age is between six (6) and sixteen (16) when the child has reached his sixth birthday and has not passed his sixteenth birthday.

(2) An unmarried child between the ages of sixteen (16) and eighteen (18) who wishes to terminate his public or non-public education prior to graduating from high school shall do so only after a conference with the principal or his designee, and the principal shall request a conference with the parent, guardian or other custodian. Written notification of withdrawal must be received from his parent, guardian or other person residing in the state and having custody or charge of him sixty (60) days prior to withdrawal. The written notification shall be dated and the signature witnessed by the principal of the school or his designee, where the child is in attendance. During the sixty (60) day period the parent(s) and child shall be required to attend a one (1) hour counseling session where they shall view a media presentation prepared by

the department of education which shows economic statistics and other information on potential problems of non-graduates.

(3) A child's age is between sixteen (16) and eighteen (18) when the child has reached his sixteenth birthday and has not passed his eighteenth birthday. Written permission for withdrawal shall not be required after the child's eighteenth birthday. Every child actually resident in this state is subject to the laws relating to compulsory attendance, and neither he nor the person in charge of him shall be excused from the operation of those laws or the penalties under law on the ground that the child's residence is seasonable or that his parent is a resident of another state.

B. 159.150 Definition of Truancy

Any child who has been absent from school without valid excuse for three (3) or more days, or tardy on three (3) or more days, is a truant. Any child who has been reported as a truant three (3) or more times is an habitual truant. Being absent for less than half of a school day shall be regarded as being tardy.

C. PHILOSOPHY STATEMENT

The Harlan County School System firmly believes that attendance is a student, parent, and community responsibility. The intent of the attendance procedure for the Harlan County Schools is to provide a structure within which students do gain maximum benefits from the instructional program. Regular attendance is necessary if students are to receive adequate guidance through their class work and benefit from the discussions. All students

are expected to attend class every day that school is in session. The progress of a student at school depends greatly on the punctuality and regularity of attendance. It is desirable that every student should be in the designated area five minutes before the beginning of school. Also, each student should be in class on time.

D. NON-CREDIT/NON-PROMOTION

In order for a student to be promoted to the next grade level in grades K-8 or to receive credit for a high school course he/she must be in attendance for 155 days (20 days absent) each school year (or 77 days/10 days absent) for student enrolled in a semester course at the high school level. Absences in kindergarten through the eighth grade are calculated on a period by period basis for each class.

Credit at the high school is given on a semester basis. Students are expected to miss no more than ten (10) days per semester in order to receive credit for the course work taken that semester. Absences on the high school level are calculated on a period basis for each individual class.

When a student must be absent from school for illness death in family, communicable disease, injury, quarantine or other unforseeable emergency, it is the responsibility of the parent/guardian to call or write a note to the school where the child is enrolled to inform the principal of the reason for absence.

The written excuse should include the full name of student, date or dates, reason, and full signature of the parent/guardian.

If, due to an illness or an injury, it is believed by the principal, assistant principal, teacher, counselor or parent, that a student will be absent from school for a week or more, efforts are to be made to place that student on homebound instruction.

E. HOMEBOUND INSTRUCTION

Homebound instruction is offered for two hours a week to students who are certified by a statement from a physician, psychologist, physchiatrist and/or health officer as unable to attend school for an extended time. It is designed as a temporary measure and is not intended to take the place of regular classes. Parents should get a homebound form from their child's principal before any scheduled hospital visit or if they anticipate the doctor will require the child to remain home for four or more days.

F. EXCUSED ABSENCES/TARDIES

A student is expected to regularly attend school and to be punctual. If a student receives an excused absence, the student is expected to accept responsibilities to see the teacher and ask what work is to be made up. The student will have one day to make up work missed for each day of school missed. Students leaving school early shall have their absences excused only for reasons designated in this policy as excused. The principal or his designee shall be responsible for assigning excused absences. Absences for reasons other than those listed below will be unexcused and students will not be allowed to make up any work.

The following rules and regulations do not take precedence over the truancy laws of the Commonwealth of Kentucky.

1. student is sick and has a note from parent (limit two (2) consecutive days only except for infectious disease, limit _____ days per year;

2. student is six for three (3) or more days and has a doctor's statement/hospital slip (For chronic illnesses one doctor statement should be sufficient);

3. medical or dental appointments that cannot be made for after school hours. (Verification by a slip from the doctor confirming date and time);

4. serious illness in immediate household;

5. court subpoena;

6. death of a relative or attendance at a funeral;

7. natural disaster beyond control of student;

8. interviews for college or vocational school (Pre-approved by school official and verification of interview will be required);

9. school sponsored trips are not absences as they relate to the Attendance policy (Student participating in such trips are required to do work missed while out);

10. other valid reasons acceptable to the principal, but not to exceed 5 days per year.

All other absences/tardies will be considered unexcused absence/tardies.

Definition of unexcused absence: A student who is absent for part or all of the school day for reason other than set forth above regarding excused absences.

Definition of unexcused tardiness: A student who is absent without a valid excuse for less than half a school day, including being absent from a class for a part of a class period. Only one tardy per day is counted against a student for truancy purposes.

Examples of absences from class which may not be excused include but are not limited to the following:

1. Indifference of parent
2. Too poor to come to school
3. Working at home or business
4. Transportation (missed bus)
5. Distance from school or bus
6. Unknown by school or parent
7. Suspension
8. Oversleeping
9. Baby sitting
10. Going somewhere with parent since there will be no one home to receive them in the afternoon.

G. ABSENTEEISM LIMITS – K-8

- No student will be given credit for any grade level or class if twenty (20) or more classes/ days are missed during the year except by recommendation of the school principal.

- After a student has missed classes/days (10) times (accumulated) during the year, the teacher will notify the principal. The principal shall notify the parent by MAIL and schedule a conference with the parents. The conference should be scheduled no later than three (3) days after the notification could be expected to be received by the parent, whenever possible.

- The principal shall set up the time for the conference.

- The Director of Pupil Personnel shall notify parents by certified letter when a student has been truant 6 days.

- Parents shall be notified by their child's principal of the loss of credit and absence after twenty (20) days of absence.

ABSENTEEISM LIMITS – 9-12

Year Courses

- No student will be given credit for grade level or classes if twenty (20) or more classes/days are missed during the year except by the recommendation of the school principal.

- After a student has missed classes/days (10) times, (accumulated) during the year, the principal shall notify the parent(s) by MAIL and schedule a conference with the parent(s). The conference should be scheduled no later than three (3) days after the notification could be expected to be received by the parents, whenever possible.

- The principal or his/her designee shall set up the time for the conference with the agreement of the parents.
- The Director of Pupil Personnel shall notify parents by certified letter when a student has been truant 6 days. The notification shall include the warning that twenty (20) absences from class may result in failure.
- The principal or his designee shall set up the time for the conference.
- Parents shall be notified of the loss of credit by the principal after twenty (20) days of absences.

Semester Courses

- No student will be given credit for a class/ classes if 10 or more days are missed in the semenster/(If a student has missed ten (10) classes, one-ninth of the semester has been missed).
- After a student has missed a class/classes five (5) times accumulated during one semester, the parent will be notified by MAIL.
- PARENTS shall be notified of the loss of credit and/or absences after ten (10) class/ classes absence.

PAGING DEVICES

1. A student in a public school shall not possess a paging device while on school property or while attending a school-sponsored or school-related activity on or off school property unless the student is in attendance in the

capacity of an active member of a volunteer emergency medical services organization.

2. A person who discovers a student in possession of a paging device in violation of this section shall report the violation to the appropriate school administrator, as determined by school policy, who shall order a peace officer or appropriate school employee to confiscate the device, which is forfeited to the school district.

3. In this section, "paging device" means a telecommunications device that emits an audible signal, vibrates, displays a message, or otherwise summons or delivers a communication to the possessor.

Failure to comply with the above provisions of HB.88, will result in punishment through consequence A, B, C or D.

CRIMINAL VIOLATIONS

Students are accountable to their school in their role as students as well as to the law in their capacity as citizens. The criminal laws of the Commonwealth of Kentucky and of the federal government apply to the conduct of all persons on school property. Violations should be dealt with according to these laws and the local school board policy.

Criminal offenses are acts which result in violence to another person or his property or which pose a direct threat to the safety of others in the school. Such offenses are clearly criminal.

Due to the seriousness of criminal offenses, the student's continued presence in the school would constitute

a threat to other persons and would have a negative impact on the general morale of the school. Verified criminal conduct could result in the immediate removal of the student from the school, pending a hearing before the board in accordance with KRS 158.150.

Schools should report these offenses to the appropriate law enforcement agency and assist these agencies in investigating and prosecuting the offender. In cases of assault and/or battery on a student or school employee, it is suggested that these persons press charges. The district should encourage this practice and give full support to the aggrieved individual in the legal pursuit of this matter.

A student charged with criminal conduct should be given a full due process hearing before the board, which should take prompt and appropriate action. Since disciplinary action by the school in criminal matters does not constitute "double jeopardy", the board need not await the disposition of the hearing or trial.

CORPORAL PUNISHMENT

Corporal punishment should not be employed as a first line of punishment, but may be used if other methods fail.

Students should be forewarned that specific misbehavior could lead to spanking.

A teacher or principal must administer corporal punishment in the presence of a second school official.

The second official (witness) must be informed beforehand and in the presence of the student the reason for the punishment.

The teacher or principal who has administered the punishment must provide to the student's parents, upon request, a written explanation of the reason for the punishment and the name of the school official who was present.

The teacher or principal who deems it necessary to paddle must consider the age, size and sex of the child as well as the gravity of the offense. Should there be any medical reason for the student not to be corporally punished, the parent/guardian should so notify the teacher/principal.

In cases of parental objection to corporal punishment an alternative course of action will be determined through a conference with the principal, referring teacher, parent(s) and student. If parents object to corporal punishment it is their responsibility to notify the proper school official upon enrollment of the student. It may be necessary to remove the student from the class/school until the parent(s) can be notified for a conference.

SEARCH AND SEIZURE

Lockers are the property of the school and are subject to the board's regulation and supervision. Locker inspection or searches are not carried out as a harassment technique but as a duty when the health, safety, or welfare of students in [sic] involved. In a search and seizure situation the following procedures shall be followed:

A student's person will be searched only when there is reasonable suspicion that the student is concealing evidence of an illegal act or school violation. Illegal items (weapons, firearms, etc.) or other possessions reasonably determined by the proper school authorities to be a threat to the student's safety, or security and others' safety or security may be seized by school officials.

Items which may be used to disrupt or interfere with the educational process may be temporarily removed from the student's possession by a staff member. These items may be returned to the student by the staff member or through the office.

A general inspection of school properties such as lockers, desks, etc. may be conducted on a regular basis. During these inspections, items which are school property may be collected. (Example: over-due library books).

Illegible which have been seized will be turned over to proper authorities or returned to the true owner, depending on the situation. The student may have the opportunity to be present when a search of personal possessions is to be conducted unless: (1) the student is absent from school, or (2) school authorities decide the student's presence could endanger the pupil's health and safety.

DISCIPLINE AND THE EXCEPTIONAL STUDENT

Identified exceptional students in the Harlan County Schools should be instructed in areas relevant to responsible pupil conduct. This should include drug-alcohol and moral-values education. Exceptional students are

expected to conform to school rules, as are their non-handicapped peers. Thus, definite terms suspensions of exceptional students are permissible in that they do not create a "change in placement" for purposes of the federal special education laws. Indefinite suspensions, however, do constitute a "change in placement for purposes of the law and cannot arbitrarily be used by school administrators to punish exceptional children for rule infractions. Expelling an exceptional child from school is viewed by the courts to be a "change in placement" and can only be utilized by the Admissions and Release Committee (ARC). The ARC must make the determination that the infraction committed by the exceptional student which warrants expulsion, is unrelated to the child's handicapping condition. For further discussion and clarification refer to the districts' "Policies and Procedures for Exceptional Children Handbook."

SUSPENSION AND EXPULSION

KRS 158.150 – "All pupils admitted to the common schools shall comply with the lawful regulations for the government of the schools. Willful disobedience or defiance of the authority of the teachers or administrators, use of profanity or vulgarity, assault or battery or abuse of other students or school personnel, the threat of force or violence, the use or possession of alcohol or drugs, stealing or destruction or defacing of school property or personal property, the carrying or use of weapons or dangerous instruments, or other incorrigible bad conduct on school property as well as off school property at school sponsored activities constitutes cause for suspension or expulsion from school."

Suspension from the Harlan County Schools is a severe disciplinary measure. Suspension is usually for one (1) to three (3) days although it can be longer. A student who receives a first suspension may or may not be required to return to school with his/her parents. Students who receive a second or third suspension during a school year will be required to have one or both parents meet with the principal or assistant principal before being allowed to return to school. A fourth suspension could result in expulsion for the remainder of the school term.

Students on suspension or expulsion are not eligible to participate in any school activities. Snow days, holidays, or weekends do not constitute suspension days.

When a student is on suspension/expulsion, all teachers of that student shall be notified by the principal.

The following student violations may constitute cause for suspension or expulsion and in some cases notification of higher authorities may be required:

- Smoking on school property.
- Malicious mischief: destruction or defacement of school or personal property, – damages will be paid by students and/or parents/guardians.
- Malicious setting off [sic] fire alarm.
- Burglary: theft of school or personal property.
- Possession and/or use of any weapons, dangerous instruments or any type of explosive (including smoke bombs).

- Making a threat that a bomb has been placed in or is about to explode on school property or at a school sponsored activity.
- Use of, possession of, transmittal of, or under the influence of alcoholic beverages, illegal drugs, materials, or controlled or illegal substances.
- Extortion, blackmail, or coercion – obtaining money or property by violence or threat of violence, or forcing a person to do something against his/her will by force or threat of force.
- Gambling.
- Willful disobedience of the authority of teachers/administrators or other school personnel.
- Assault/battery: physical threats or violence to other persons.
- Arson: intentional setting of fire.
- Trespassing: presence in an unauthorized place or refusal to leave when ordered to do so.

Fighting on school property (any student who finds himself/herself the victim of harassment should notify a teacher or principal).

Skipping class (includes over 10 minutes tardy).

Vulgar or profane or disrespectful language or behavior in school, on school grounds, or on school buses.

Any act endangering the health and safety of fellow students and/or school staff.

Reckless driving and/or speeding on school property.

Leaving school grounds without permission or under false pretenses.

Falsely using the name of another person, or falsifying documents or correspondence from or to the school.

Excessive tardiness.

Untruthfulness to teachers or other school staff.

Violating the conditions of probation or suspension.

Disorderly conduct which is disruptive to the orderly educational procedure of the school.

Being on school grounds or in school building without authority or permission of school personnel (suspended students are not allowed on school property).

Disruptive behavior on a school bus enroute to or from school or school functions or at a bus stop.

State and/or Federal Offense.

A probationary period may be established for students when a school principal determines that a student would benefit more by remaining in the classroom or an alternative program, than by incurring out-of-school suspension. When a suspension has been meted for a certain number of days after a due process hearing, as required by the Code, the principal may, at his discretion, probate the suspension for a period not to exceed the remainder of the school year on condition of good behavior of the student during the period of probation that, in his sole judgement, the student has been guilty of any improper

behavior, the probation may be revoked by the principal and the suspension immediately implemented.

A student who receives a fourth suspension during a school year will face possible expulsion. This expulsion will be considered in a hearing at the next regularly scheduled Board of Education meeting. A student who is expelled will usually be allowed to re-enter school the following year but on a probationary basis.

In case of an extremely serious offence, a student may be expelled before reaching a total of four suspensions.

A student is prohibited from entering any school or any school grounds (except for a prearranged conference with an administrator), attending any day or night school function (except those open to the public) of the Harlan County Public School or riding a school bus during the term of suspension. Violation of this is cause for expulsion.

BUS SAFETY RULES AND POLICIES
702 KAR 5:090. Pupils' Responsibilities

Relates to KRS 156.160, 189.540
Pursuant to KRS 13.082, 156.070, 156.160
Necessity and Function: To make the pupils that ride the buses to and from school aware of their responsibilities relating to pupil transportation.

Section 1. Pupils shall wait at their assigned bus stop off the traveled roadway and shall remain there until the driver has stopped the bus and opened the entrance door, and signaled the pupils to enter the bus.

Section 2. When pupils must cross the roadway to enter the bus or cross the roadway when leaving the bus, they shall not cross the roadway until signaled to do so by the driver.

Section 3. For safety reasons, when the pupils are required to cross the roadway when entering the school bus or leaving the school bus, these roadway crossings shall be made in front of the bus. The pupils shall cross the roadway a distance of approximately ten (10) feet in front of the bus in order that they may be seen by the bus driver.

Section 4. When pupils enter the bus, they shall proceed promptly to their assigned seat.

Section 5. Pupils shall remain seated until the bus has come to a complete stop before leaving their bus seats to get off the bus.

Section 6. For safety reasons, pupils shall not extend their arms, legs, or heads out the bus windows while the bus is in motion.

Section 7. Pupils shall not change from one seat to another while the bus is in motion unless given permission by the bus driver to do so.

Section 8. Pupils shall not create noise on the bus to the extent that it might interfere with the driver's ability to hear the signals of emergency vehicles or an approaching train.

RIGHTS AND RESPONSIBILITIES.

The United States Constitution provides for the protection and safeguard of all people. In this same vein, there is responsibility inherent in all rights. Therefore, all participants in the schooling process must exercise the self-discipline and care necessary to afford others the same rights and to guarantee that their own actions do not infringe upon the rights of others. Further, all participants have the right and responsibility to know and understand the basic code of conduct expected of them. The following paragraphs outline both the rights and responsibilities of all participants.

A. Student Rights. All students have the right to:

1. attend public schools which maintain high educational standards and meet individuals needs.
2. be informed of rules, regulations, policies, and penalties to which they may be subjected and to be assured of all due process of rights.
3. be respected as a worthwhile person.
4. reasonable physical protection and safety of personal property.
5. seek advice and counseling in academic, personal, social and career related concerns.
6. free student elections for organizations within the school or their counterparts within the state or nation.
7. candidacy and to hold office in student organizations within the school or within the state or nation.
8. access to and interpretation of their own personal school records if 18 years of age, or older,

or if younger, with consent of parents/guardians.

9. examination of their personal school records by the parents/guardians or their authorized representative.

10. expect that when information is offered in a disciplinary case, the confidentiality of the student will be respected unless the testimony of the student is required in a hearing in the school or before the Board of Education or in a court proceeding.

11. receive academic grades based on academic performance.

12. expression of their point of view so long as it does not infringe on the rights of others.

13. make recommendations regarding classes offered and to select and participate in classes which will best meet individual needs.

14. wear clothes which are attractive, fashionable or modish provided they are properly fitted and nor hazardous or harmful to themselves or others.

B. Students have the responsibility to:

1. attend all classes daily and on time, unless excusable circumstances prevent them from doing so.

2. provide the school with an admissible explanation and documentation concerning each absence.

3. obtain and make-up, within a specific time, work which has been missed.

4. abide by school bus rules.

5. become familiar with and observe the laws, policies, and regulations which concern their conduct.

6. behave in such a manner that uninterrupted learning can take place.

7. observe the basic standards of cleanliness, modesty, and good grooming and dress in a manner that is not disruptive to a classroom setting.

8. wear clothing which contributes to their own health and safety as well as that of others. Also do not wear clothing that advertises vulgar or profane language or drugs.

9. show respect for fellow students, all School Board personnel, and authorized school visitors.

10. neither take nor damage the property of other students or school personnel.

11. respect the privacy of the property and the individuals who live in the area surrounding the school grounds and bus stops.

12. respect and maintain the property of the school system.

13. express themselves without violating the rights of others or interfering with the orderly educational process.

14. behave in such a manner as will serve as an example and guide to other students, if serving on the Student Government.

15. organize and conduct clubs and groups in an orderly manner, without discrimination.

16. respect the rights, property and privacy of other students and school personnel.

17. carry only those materials which are acceptable under the law, and which are not hazardous to any person or property, and to accept the consequences for prohibited articles stored in their lockers.

C. Teachers have the right to:

1. the support of co-workers and administrators.

2. work in an educational environment with a minimum of disruptions.

3. expect all assignments including homework, to be completed and turned in as assigned.

4. discipline a student for disruptive behavior and to refer him/her to guidance counselor or to the school administrator.

5. administer corporal punishment only in the presence of another teacher or the school administrator.

6. enjoy safety from physical harm and freedom from verbal abuse.

7. take action necessary in emergencies to protect their own person or property or the persons or property of those in their care.

8. withhold permission for student exemption from class for other activities when absence from class would affect student's academic achievement.

D. Teachers have the responsibility to:

1. maintain an orderly classroom.

2. prepare adequate lesson plans for an effective program.
3. enforce the course of study, the use of the legally authorized textbooks, and the rules and regulations prescribed for the Harlan County Schools.
4. encourage the development of trust, cooperation and responsibility.
5. make an effort to improve the self-image of each student through positive reinforcement.
6. maintain necessary records of student progress and attendance as accurately as possible.
7. inform parents/guardians of children's successes, problems or failures promptly.
8. deal with discipline problems personally until all strategies at the teacher's command have been exhausted.
9. hold pupils to a strict account of their conduct in school, on the way to and from school, on the playgrounds, in the lunchrooms and cafeterias, and during intermission or recess.

E. Parents and Guardians have the right to:

1. send their child to a school with a positive educational climate.
2. expect classroom disruptions to be dealt with fairly, firmly, and quickly.
3. be informed immediately of any discipline problem requiring suspension or expulsion of their child.
4. review the child's academic progress and other pertinent information which may be contained in the student's personal records.

5. expect their school to maintain high academic and accreditation standards.

6. address grievances concerning their child by following procedures as outlined in the Harlan County Complaint and Communications Procedures.

F. Parents and Guardians have the responsibility to:

1. establish and maintain, in the home, a positive attitude toward education.

2. instill in their children a sense of responsibility.

3. insure their child's regular daily attendance and promptness to school.

4. report and explain any absence to the school.

5. show an interest in their child's work and progress through regular communication with the school.

6. inform the school of any condition or circumstance which may effect [sic] their child's ability: to learn, to attend school regularly, or to participate in school activities.

7. cooperate with the school when their child is involved in a disciplinary matter.

G. Principals have the right to:

1. expect staff members to comply with policy and directions of the principal.

2. suspend any student whose conduct disrupts the educational process.

3. expect respect from students, parents/guardians and staff members.

H. Principals have the responsibility to:

1. develop within the school a good working relationship among the staff and with the students.
2. provide and maintain an atmosphere conducive to good behavior and learning.
3. develop and direct a program of instruction that will meet the needs of students and that will encourage high academic achievement.
4. actively solicit parent and community involvement in the total school program in order to promote a more positive parent-community-school relationship.
5. administer discipline fairly and equally, following the guidelines set forth herein, but also using his/her own judgement.
6. follow due process procedures in all cases involving staff and students.
7. provide a minimum of six (6) full hours of instruction per school day.

APPLICATION OF CODE

The solution to a problem or the resolution of a conflict, within the educational setting, can be accomplished on an informal basis by the people most frequently involved: the teacher and the student. Every effort should be made by the teacher to handle the situation with the student at the time unacceptable behavior occurs. If it is misconduct of a serious nature, referral to the principal may be in order.

The code outlines those kinds of student behavior which are considered unacceptable, and the consequences

of such behavior. A range of consequences has been provided for each incident of misconduct. The range is offered in order to provide school personnel with some flexibility in dealing with unacceptable behavior. At all times, in disciplinary action, due process will be followed.

II. ATTENDANCE

A. FAILURE TO MAKE UP WORK

Failure to make up work within alloted time after an excused absence.

(2 days for each day of absence).

Example: 3 days absent, 6 days to make up work.

Consequence A

B. UNEXCUSED ABSENCES

1. Failure to phone or bring note from home upon return to school; failure to bring doctor's note upon request.

2. Absent from any class without permission.
Consequence B

C. UNEXCUSED TARDIES

Failure to enter class within established schedule.
Consequence C

D. LEAVING CLASS WITHOUT PERMISSION

Leaving class without permission but remaining on campus.
Consequence D

E. LEAVING SCHOOL WITHOUT PERMISSION

Leaving school grounds without permission.
Consequence D

F. MISCONDUCT ON BUS

Misconduct on the bus that could result in injury to self and/or other occupants of the bus or to persons outside the bus or damage to the bus by malicious acts.
Consequence E

CONSEQUENCES

A. 1. Zero grade for all assigned work tests/exams.

2. Teacher/Student conference.

3. Parent notification.

4. Guidance/Principal referral.

5. If there is reason to question the note excusing the absence, the student may be referred to the Director of Pupil Personnel for further investigation.

B. 1. All assigned work (homework, classwork, and tests) missed during any unexcused absence will be given a zero grade. All such zeros will be included in the average of the final grade of marking period.

2. Teacher/Student conference.

3. Parent must be notified after any three (3) days of unexcused absence.

4. After three (3) days of unexcused absence, the student will be referred to guidance and administration.

5. After six (6) unexcused absences, the student will be referred to the Director of Pupil Personnel.

6 Suspension.

C. 1. Missed work automatically recorded as zero.

2. Parent must be notified after any three (3) unexcused tardies.

3. Detentions or essay on importance of promptness (each to be acknowledged by signature of parent.)

4. Referral to guidance and administration.

5. Corporal punishment may be given to student by administration, being witnessed by one other person.

D. 1. Zero grade for work missed.

2. Teacher/Student conference.

3. Guidance/Administrative referral.

4. Parent notification.

5. Detention.

6. Corporal punishment.

7. Police involvement when necessary.

E. 1. Driver reports incident.

2. Parent notification.

3. Principal/Driver/Student conference.

4. Suspension from school bus. (This does not excuse student from school. Parents are responsible for transportation.)

5. Payment for damages committed by student.

6. Up to 10 days suspension from school and all school activities.

II. GENERAL MISCONDUCT

A. MINOR MISBEHAVIOR

1. Failing to have appropriate materials and supplies (books, paper, pencil, etc.).
2. Throwing waste or trash on floor or school grounds.
3. Whispering or making rude and unnecessary comments.
4. Bringing unauthorized items to school (radios, tape players, recorders, toys, pets, or any other disruptive materials).
5. Bringing unauthorized visitors to school including young children.
6. Using class time improperly.
7. Losing or damaging textbooks, library books, or related materials.
8. Failing to complete assigned work.
9. Using profane, obscene, indecent, or immoral language and/or gestures.
10. Unacceptable physical contact (hitting, pinching, hairpulling, etc.).
11. Running in halls and buildings.

Consequence A

Consequence B

B. MAJOR MISBEHAVIOR

1. Posting or distributing unauthorized material on school grounds. (Example: pornographic).

2. Defiance of authority.
3. Gambling.
4. Throwing or projecting any type of object.
5. Leaving the classroom without a pass.
6. Cheating and/or copying.
7. Willfully defacing equipment and facilities.
8. Fighting and willfully engaging in physical contact for the purpose of inflicting harm on another person. NOTE: Students and parents may be responsible for medical or property damages.
9. Possession or use of tobacco products on school grounds.
10. Intimidating, insult by malicious remarks, or in other manner abuse verbally or in writing any member of the school staff or student body.
11. Displaying any unacceptable physical contact of a sexual nature (kissing, petting, etc.).
12. Conducting non-school related money raising drive.
13. Failing to obtain permission to solicit funds or operate fundraising activities.

Consequence A

Consequence B

Consequence C

Consequence D

C. CRIMINAL ACTS

1. Making a threat that a bomb has been placed, or is about to explode in a school, or initiating a false fire alarm.

2. Taking of property of others (students, teachers, visitors, etc.) without their consent, possession of stolen property, or possession without owner's permission, and selling of school property.

3. Possessing, distributing, selling or using drugs, marijuana, or other mood altering substance, drug paraphernalia, or alcoholic beverages anywhere on school premises.

4. Attempting to take property or money from another by the threat or use of force.

5. Possessing, distributing, selling or use of firearms, knives, explosives, and other dangerous weapons and objects on the school premises.

6. Possessing or distributing any material that would detract from the educational process or that is prohibited by law.

7. Using or possessing prescriptive drugs on school grounds without the knowledge of principal and/or teacher (student must have note from parent or doctor).

Consequence D

CONSEQUENCES

A 1. Teacher/Student conference.

2. Disciplinary action initiated by teacher (detentions; compositions expressing awareness of seriousness of offense, reviewed and signed (by parent).

3. Teacher/Parent conference.

4. Referral to administrator.

5. Confiscation of items until end of day, at which time they will be returned.

B. 1. Student/Teacher conference.

2. Teacher/Parent/Student conference.

3. Administrator referral.

4. Corporal punishment.

5. Restitution for damages to books or related materials.

C. 1. Referral to administrator.

2. Notify parents.

3. Teacher/Parent/Student/Administrator conference.

4. Up to 10 days suspension from school.

5. Corporal punishment.

D. 1. Principal involvement.

2. Police involvement.

3. Immediate parent notification.

4. Up to 10 days suspension and/or recommendation to superintendent and Board of Education for expulsion.

5. Confiscation of all unacceptable items (Example: fireworks, knives, drugs, etc.).

6. Search of lockers.

FREE SPEECH ASSEMBLY AND STUDENT PUBLICATIONS.

A. FREE SPEECH AND ASSEMBLY.

1. Failure to obtain prior approval for distribution or posting of communicative materials.

2. Failure to inform the principal of the intent to circulate petitions or surveys.

3. Circulating petitions or surveys during class time.

4. Boycotting of any required class or required school function such as an assembly.

5. Failing to obtain permission to hold a demonstration or holding one after having been denied permission.

6. Creating a disruption during a meeting, assembly, or at sports activities which endangers health, safety and/or damages property.

7. Inciting a riot or participating in one.

Consequence A

Consequence B

B. PUBLICATIONS

1. Printing articles, pictures, or comments which contain obscenities, libelous statement, or personal attacks.

2. Failing to obtain approval of contents by principal or his/her designee before printing of any school publication.

3. Failing to obtain permission to solicit funds or sell advertisement for school publications.

Consequence B

CONSEQUENCES

A 1. Referral to administrator.

2. Notify parents.

3. Teacher/Parent/Student/Administrator conference.
4. Up to 10 days suspension from school.
5. Corporal punishment.

B. 1. Principal involvement.
2. Police involvement.
3. Immediate parent notification.
4. Up to 10 days suspension and/or recommendation to superintent and Board of Education for expulsion.
5. Confiscation of all unacceptable items (Example: fireworks, knives, drugs, etc.).
6. Search lockers.

HARLAN COUNTY STUDENT DRUG POLICY

All drugs (medication) in the possession of a student must be registered in the principal's office immediately upon arrival at school each day.

If a student is taking medication, a note must be sent by the parent/guardian to the principal.

Arrangements can be made through the principal's office by the parent/guardian for long-term medication approval.

Any drug not registered in the principal's office may be considered an illegal drug at school.

For possession, use, or being under the influence of alcohol, drugs, or look-alikes while at school, on school grounds, or at school sponsored events on or away from

school grounds, the student will be subject to a minimum of (10) days suspension from school for a first offense. (Subject to provisions of Student Suspension and Expulsion Policy.)

Five days of this suspension may be waived if the family: 1) Decides to seek an evaluation of the student's alcohol/drug use from a qualified Chemical Dependency Counselor acceptable to the school board, and 2) completes any and all treatment as recommended in the evaluation, or 3) meets with the School student Assistance Coordinator or a school counselor individually, or in a group a specified number of times. (Note: The Harlan County Board of Education will not be responsible for the cost of said treatment/counseling.) Failure to complete both the evaluation and the treatment as recommended or to keep all specified appointments with the counselor or the coordinator will result in the reinstatement of the five day suspension that was previously waived.)

In addition, if no treatment is recommended the school may require that the student meet with the school counselor or the coordinator or complete a designated alcohol/drug education program in order to qualify for the waiver of the five days of suspension.

A second offense will result in immediate suspension and recommendation for expulsion for the remainder of the school year.

Sale or transmission of alcohol, drugs, or look-alikes will result in immediate suspension with recommendation for expulsion for the remainder of the school year.

Revision of this document was approved by the Harlan County Board of Education June 27, 1990.

CERTIFICATION OF RECEIPT

The signature below indicates that I as a parent/guardian of a student in a Harlan County School have received a copy of the Harlan County Schools Discipline Code and will communicate with my child to help him/her understand the rights and responsibilities he/she has as a student.

/s/ Debbie L. Sayler
Signature of Parent

/s/ Randy Wayne Saylor, Jr.
Printed Name of Student

Signature of Student

Coldiron, Kentucky
Address of Student

8th — Grade Level
Wallins Jr. High — School Name

Date